



Digitized by the Internet Archive
in 2022 with funding from
University of Toronto

<https://archive.org/details/31761114690274>

24N
C 40
C 56

GOVT PUBNS

Commercial Registration Appeal Tribunal

Summaries of Decisions
Volume 1



CA20N
FC 90
CS6

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS - VOLUME I

(18 May 1971 to 31 December 1972)

Published pursuant to The Ministry of Consumer and
Commercial Relations Act, Revised Statutes of Ontario
1970, Chapter 113.



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TABLE OF CASES SUMMARIZED

The Consumer Protection Act

	<u>Page</u>
Connelly Asphalt Paving Company	4
Di Natale, Filippo	1
Di Natale Paving Company	1
Genova, Calogero	2
Genova Brothers Paving Limited	2
Hamilton Paving Company [I]	7
Hamilton Paving Company [II]	8
Harkin, Barry	3
King Town Paving Company	5
Manieri Paving Company	6
Motor City Paving Company	3

The Motor Vehicle Dealers Act and (former) Used Car Dealers Act

Atikokan Motor Sales	Dealer	33
August Car Sales	Dealer	14
Bilow, William H.	Dealer & Salesman	17
Broder Motor Sales	Dealer	22
Carling Cars	Dealer	18
Crang Plaza Motors Limited	Dealer	15
Crosbie, John T. M.	Salesman	12
Dowling, William George I	Salesman	15
Dowling, William George II	Salesman	21
Ferguson, T. Reginald	Salesman	11
Forndran, Anthony Douglas	Salesman	14
Giardino, Fernando	Salesman	33
Gilliland, Robert Sim	Salesman	16
Gower, William John	Salesman	9
John Tinney Motor Sales	Dealer	19
Johnson, Jack Joseph	Salesman	27
Jones, Harvey George	Salesman	25

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TABLE OF CASES SUMMARIZED

The Motor Vehicle Dealers Act and (former) Used Car Dealers Act (cont'd)

	<u>Page</u>
LaRiviere, Thomas	28
Leslie, Alexander	31
Main Auto Sales	17
Maitland, James	10
McInerney Motor Sales	30
McInerney, Philip J.	30
McIsaac, Lloyd	23
McIsaac, Roderick	26
Pollock, Jean	18
Pollock, Ross	18
Reg. Ferguson Pontiac Buick Ltd.	11
Riviera Motors	29
Robert Rowe Motors Limited	20
Roderick McIsaac Auto Sales	26
Rowe, Robert H.	20
Smith, Lawrence John	32
Smith, Leo	24
Sun Motor Sales	31
Tellier, Mrs. Claudette	22
Thompson, Clare J.	13
Tinney, John Cameron	19
Wilkinson, Arthur K.	26
Wright, Richard	29

The Real Estate and Business Brokers Act

Brown, Ludmila Roxana	35
Cook, Glenn	39
Fera, A. R.	37
Hodgkinson, Ernest	34
Laushway, Carl P.	36
Lenchyshyn, Michael	40
Masters, Ronald E.	38
Snell, Douglas Forest	35

F. DI NATALE PAVING COMPANY
and FILIPPO DI NATALE
Applicant

1971
TORONTO
OCTOBER 4TH

and

REGISTRAR OF CONSUMER PROTECTION BUREAU

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
S. M. MARMASH, C. C. HOLMES

COUNSEL: GARY C. C. WALKER for the Applicant
ADI N. MAJAINA for the Respondent

NOVEMBER 8, 1971

Application by Respondent under section 7 of The Consumer Protection Act, R.S.O. 1970, Chapter 82 for revocation of registrations of Applicants. At the outset counsel for Applicants indicated they wished to surrender their registrations, that they had refunded deposits where work was not done, and that they would try to adjust claims against them regarding faulty workmanship and to make refunds where necessary. Tribunal commended Applicants on good faith shown.

ORDERED: Revocation of Applicants' registrations.

GENOVA BROTHERS PAVING LIMITED
and CALOGERO GENOVA

1971

TORONTO

NOVEMBER 4th

Applicants

and

REGISTRAR OF CONSUMER PROTECTION BUREAU

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, B. F. GRANT, JR.

COUNSEL: LEON OFFMAN for Applicants
ADI N. MAJAINA and SHEILA DIGNAN
for Respondent

NOVEMBER 12TH, 1971

Registrar proposed to revoke or suspend registrations of Applicants as itinerant sellers under Consumer Protection Act, R.S.O. 1970, Chapter 82, alleging past conduct affording reasonable grounds for belief they will not carry on business in accordance with law, integrity and honesty. Applicants failed to appear at the hearing. Evidence adduced indicated many complaints had been received at Consumer Protection Bureau and these were communicated to Applicants and opportunities given to rectify and resolve them, which Applicants ignored or otherwise failed to reply to and generally disregarded. Applicants were in breach of regulations under the Act in failing to notify a change of place of business in time and in carrying on business from a place not authorized. Tribunal found that Applicants failed to supply information requested by Registrar as required by the Act.

ORDERED: The Registrar's proposal to revoke registrations is confirmed effective immediately.

MOTOR CITY PAVING COMPANY
and BARRY HARKIN
Applicants

1971
TORONTO
NOVEMBER 30TH

and

REGISTRAR OF CONSUMER PROTECTION BUREAU

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
S. M. MARMASH, G. DONALDSON

COUNSEL: SHEILA DIGNAN for the Respondent

DECEMBER 9, 1971

Respondent applied under section 7 of The Consumer Protection Act R.S.O. 1970, Chapter 82, requesting revocation or suspension of Applicants' registrations as itinerant sellers for breaches of duty required under said Act, for neglect in responding to inquiries from the Registrar regarding complaints and for disregard of consumer complaints directly received. Applicants failed to appear at the Hearing. Tribunal found the above charges proved and that the form of the paving contract used by Applicants was not in accordance with section 31 of the Act and there had been failure to honour so-called 5-year guarantees.

ORDERED: Applicants' registrations revoked effective forthwith.

CONNELLY ASPHALT PAVING COMPANY

1971

TORONTO

Applicant

DECEMBER 23RD

and

REGISTRAR OF CONSUMER PROTECTION BUREAU

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, A. KELLY

COUNSEL: NEIL CONNELLY agent for Applicant
SHEILA DIGNAN for Respondent

JANUARY 6, 1972

Registrar proposed to revoke registration of Applicant as itinerant seller under Consumer Protection Act R.S.O. 1970 Chapter 82 alleging a large number of complaints had been received by Consumer Protection Bureau, that the Applicant had failed to meet with the Bureau to discuss same, that Applicant had carried on business without necessary registration, that when conditional registration was granted to Applicant it had, as before, failed to respond to inquiries of Registrar and consumers regarding complaints. Tribunal found evidence supported allegations as to non-compliance with conditions of registration and numerous delinquencies in responding to inquiries and in adjusting complaints.

ORDERED: Registrar's proposal to revoke is sustained.

KING TOWN PAVING COMPANY

Applicant

and

REGISTRAR OF CONSUMER PROTECTION BUREAU

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. H. LIND, V. V. DeMARCO

COUNSEL: JAMES E. LEWIS for Applicant
SHEILA DIGNAN and ADI N. MAJAINA
for Respondent

FEBRUARY 3, 1972

Registrar proposed to revoke registration as itinerant seller of Applicant for alleged past conduct affording the belief that it will not carry on business in accordance with law, integrity and honesty and evidence was adduced to show Applicant had:
1] failed to reply to Registrar's inquiries concerning complaints received at Consumer Protection Bureau 2] failed to refund deposits when work not done 3] failed to perform work in reasonable time after entering into performance contract 4] disregarded consumer complaints directly received 5] continued to use its form of contract with false specification 6] failed to adopt approved form of paving contract 7] included false information in its application for renewal of registration.

Tribunal found sufficient evidence to support above allegations but that many of the Applicant's misfeasances were due to a lack of understanding of English by the proprietors and because they operated without office staff and operations involved travel over considerable distances involving prolonged absences from home base. Tribunal found that Applicant failed to keep trust account for deposits. Tribunal found mitigating circumstances.

ORDERED: Proposed revocation set aside and registration directed for probationary period ending December 31, 1972 subject to Applicant's prompt completion of certain specific work, the refunding of certain deposits, and observance of reasonable directions of the Registrar and performance of statutory requirements.

1972
TORONTO
JANUARY 5TH,
6TH and 11TH

MANIERI PAVING COMPANY
Applicant

1972
TORONTO
FEBRUARY 7TH

and

REGISTRAR OF CONSUMER PROTECTION BUREAU

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN J. MORNINGSTAR,
G. DONALDSON

COUNSEL: SHEILA DIGNAN for Respondent

FEBRUARY 29, 1972

Registrar proposed to revoke registration of Applicant as itinerant seller which had been issued subject to conditions imposed by the Registrar namely, Applicant was to promptly communicate with customer complaining and invariably within 14 days of receipt of correspondence from Registrar. It was alleged Applicant was in breach of these conditions and had carried on business while not registered.

Tribunal found Applicant had shown good faith and reasonable despatch in adjusting complaints.

ORDERED: Registrar directed to renew registration for probationary period upon conditions; Applicant to remedy certain complaints.

HAMILTON PAVING COMPANY I*

Applicant

1972

TORONTO

FEBRUARY 16TH

and

REGISTRAR OF CONSUMER PROTECTION BUREAU

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H. F. H. SEDGWICK, C. C. HOLMES

COUNSEL: PATRICK THOMPSON for Applicant
SHEILA DIGNAN and ADI N. MAJAINA
for Respondent

MARCH 8, 1972

Applicant appeals from notice received under section 7 of The Consumer Protection Act, R.S.O. 1970, Chapter 82, as amended wherein Registrar proposed to revoke Applicant's registration on basis of past conduct of the Applicant alleging that Applicant had been convicted of operating while not registered contrary to the said Act, that when it had become registered it failed to respond to repeated requests by Consumer Protection Bureau to adjust complaints against it or to reply to the Bureau or to consumers complaining directly to the Company. Tribunal found allegations of failure to adjust complaints not proved since complaints were possibly not justified.

ORDERED: Registrar to issue registration for probationary period of approximately one year, subject to conditions imposed, Applicant to correct specific complaints.

* see also Hamilton Paving case, page 8

HAMILTON PAVING COMPANY II*

Applicant

1972

TORONTO

SEPTEMBER 20TH

and

REGISTRAR OF CONSUMER PROTECTION BUREAU

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
HUGH F. H. SEDGWICK and
CAMPBELL C. HOLMES

SEPTEMBER 28, 1972

Hearing required by Applicant under Section 7 of
The Consumer Protection Act, R. S. O. 1970,
Chapter 82, as amended, arising from the Registrar's
proposal communicated to Applicant on August 23rd,
1972 to revoke Applicant's registration for non-compliance
of certain of the terms and conditions which had been
imposed by the Tribunal in its order dated March 8th, 1972.

In its reasons the Tribunal found Applicant had in part
complied and had in part failed to comply with such terms
and conditions but found grounds to excuse such non-compliance.

ORDERED: The Registrar's proposal is not confirmed and
the Applicant's registration continued subject to the same
terms and conditions imposed by its earlier order.

* see also Hamilton Paving case, page 7

WILLIAM JOHN GOWER

Applicant

1971

TORONTO

MAY 6TH

and

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. H. LIND, J. T. DAVIDSON

COUNSEL: J. C. KENNEDY for Applicant
R. G. MacCORMAC, REGISTRAR, in person

MAY 18, 1971

Registrar refused to renew registration of Applicant as a used car salesman under The Used Car Dealers Act, S.O. 1968/69, Chapter 136, on grounds that Applicant had failed to account for trust funds, that he had conducted the business of a used car salesman while not registered as such, and that he had failed to return Certificate of Registration as required by the Act when requested to do so. The Applicant required a hearing by way of appeal.

ORDERED: Registrar's decision set aside and registration to issue to Applicant following completion of 4 weekly periods of instruction in The Used Car Dealers Act under the guidance of the Regional Inspector.

JAMES MAITLAND

Applicant

1971

TORONTO

MAY 26TH

and

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. H. MORNINGSTAR,
R. BANNERMAN

COUNSEL: R. G. MacCORMAC in person
APPLICANT in person

JUNE 8, 1971

Registrar had refused renewal of registration of Applicant as a used car salesman under The Used Car Dealers Act, 1968/69 on grounds that he had previously operated a used car dealership without having obtained the legally required provincial Class "A" Garage license, and that he had continued to operate such dealership after the cancellation of the registration therefor.

Tribunal found no acts towards or complaints from the public which would be unfavourable to Applicant's application for registration.

ORDERED (without reasons): Registrar's decision reversed and registration to be issued for probation period of approximately six months.

REG. FERGUSON PONTIAC BUICK LIMITED
and T. REGINALD FERGUSON

1971
TORONTO
JULY 16TH

Applicants

and

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK, I. A. GOODMAN

COUNSEL: J. W. BURRIDGE, Q.C. for Applicants
R. G. MacCORMAC, Registrar, in person

JULY 26, 1971

Registrar proposed to revoke Applicants' registrations as dealer and salesman respectively under The Used Car Dealers' Act, 1968/69, alleging contraventions of regulations issued pursuant to the Act dealing with tampering of odometers, and recording odometer readings on sales contracts. Such contraventions were admitted by Applicants.

ORDERED: Registrar's proposal to revoke registrations to be suspended for one year on condition that a penal bond of \$10,000. be furnished and that Applicants be prepared to undergo periodic checks by inspectors authorized by the Registrar.

JOHN T. M. CROSBIE

Applicant

1971

TORONTO

JULY 27TH

and

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, M. C. JEFFREY

PRESENT: R. G. MacCORMAC, REGISTRAR, in person
No one appeared for Applicant

AUGUST 3, 1971

Registrar applies to the Tribunal for revocation or, alternatively, suspension of Applicant's registration as a used car salesman under The Used Car Dealers Act, 1968/69, S.O. Chapter 136 on the basis that Applicant was in breach of conditions imposed upon his registration namely that he had been convicted of fraud for which he received a suspended sentence, which fact he had failed to disclose in his application for renewal. Tribunal found allegation proved and also that Applicant had carried on business as a used car salesman while not so registered as required by said Act.

ORDERED: Registrar's proposal to revoke Applicant's registration is confirmed.

CLARE J. THOMPSON
Applicant

1971
TORONTO
JULY 29TH

and

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR,
H. A. KEARNEY

COUNSEL: J. D. KAPUSTA for the Applicant
R. G. MacCORMAC, REGISTRAR, in person

AUGUST 9, 1971

The Applicant requested a hearing before the Tribunal by way of an appeal from the Registrar's refusal to grant registration to him as a salesman pursuant to section 7 of The Used Car Dealers Act 1968/69, S.O. Chapter 136. Applicant, who had formerly held both a dealer and salesman registration, had a previous record of unsatisfactory conduct resulting in the cancellation of both registrations. It is now alleged against Applicant that he had carried on as a salesman while not registered as such and had successfully conspired with the treasurer of a car dealership to defraud it of a substantial sum of money. Tribunal found these allegations proved and further that Applicant was bankrupt in fact, if not in law, and that there were over \$70,000 in judgments against him.

ORDERED: Registrar's decision to refuse registration as a salesman confirmed.

AUGUST CAR SALES and
ANTHONY DOUGLAS FORNDRAN
Applicants

1971
TORONTO
AUGUST 4TH, 10TH
and 11TH

and

REGISTRAR OF USED CAR DEALERS AND SALESMEN
Respondent

TRIBUNAL: J. C. HORWITZ, Q. C., CHAIRMAN
MRS. HELEN MORNINGSTAR,
T. W. WOOD

COUNSEL: ELLIOTT PEARL for the Applicants
R. G. MacCORMAC, REGISTRAR, in person

AUGUST 24, 1971

Applicants required a hearing before the Tribunal by way of appeal from Registrar's refusal to register Applicants as used car dealer and salesman respectively under The Used Car Dealers Act, 1968/69, S.O. 1968/69 Chapter 136. Evidence indicated Applicant Forndran had been a registered salesman for approximately six years and a registered dealer for six months contemporaneously, that he had been convicted of issuing a false certificate of mechanical fitness, that a number of vehicles in poor mechanical condition had been sold by him from a dealership with which he was associated, that Applicant, although experienced, was careless in his business methods. The Tribunal found Applicant Forndran lacked financial responsibility and had a record of conduct in the automobile business not conducive to promoting the public good.

ORDERED: Registrar's decision to refuse registrations sustained.

CRANG PLAZA MOTORS LIMITED
and WILLIAM DOWLING

Applicants

and

1971
TORONTO
JULY 20TH, 21ST,
& 22ND
AUGUST 17TH,
18TH

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. H. LIND, M. GAWZA

COUNSEL: G. A. WOOTTON, Q.C. for Applicant
A. N. MAJAINA for Respondent

SEPTEMBER 8, 1971

Registrar applies to Tribunal to revoke registrations of Applicants as used car dealer and salesman respectively under The Used Car Dealers Act, 1968/9 which had been granted by Registrar on conditions and for a limited period. Registrar alleges that Applicant - 1] had failed to keep records as required by the Act and Regulations thereunder 2] had used deceptive or misleading advertising contrary to the Act and Regulations even after warnings 3] had been guilty of breaches of section 49 of The Highway Traffic Act 4] had an unusual number of complaints from dissatisfied customers.

Tribunal found numerous cases of mechanically defective cars having been sold as mechanically fit and that all four allegations above-stated were made out.

ORDERED: Registrations as dealer and salesman shall be retained on conditions, including provision of a \$50,000 penalty bond, during a probationary period of more than one year at the end of which, if there have been no proven contraventions of the Act or conviction on offences under The Highway Traffic Act or applicable Statutes, the Applicant may apply for registration free of conditions.

ROBERT SIM GILLILAND

Applicant

1971
TORONTO

AUGUST 27TH

and

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
R. H. FOSTER, S. M. MARMASHCOUNSEL: R. S. GILLILAND in person
A. N. MAJAINA for the Respondent

SEPTEMBER 8, 1971

Registrar having refused registration to Applicant as a used car salesman under The Used Car Dealers Act, 1968/69, S.O. 1968/69, Applicant required a hearing before the Tribunal by way of appeal thereupon.

Tribunal found that Applicant had carried on as a wholesale used car dealer although he had not at any time been registered as such under the Act, that he had falsely testified as to this in his application to become registered as a salesman. Tribunal further found that Applicant had a prior satisfactory record as a registered used car salesman and found no evidence of harm to the public.

ORDERED: Registrar's decision not sustained.
Probationary registration to issue subject to conditions.

MAIN AUTO SALES and WILLIAM H. BILOW

Applicants

and

1971

TORONTO

AUGUST 31ST

OCTOBER 1ST

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
J. F. KENNEDY, S. M. MARMASH

COUNSEL: RICHARD BROUGHTON for Applicants (1st October only)
A. N. MAJAINA for Respondent

OCTOBER 14, 1971

Registrar had refused registration of Applicants as used car dealer and salesman respectively under The Used Car Dealers Act, R.S.O. 1970, Chapter 475 on grounds of unfitness. From the evidence Tribunal found that Applicant Bilow had sworn falsely in Applications for Registration as a salesman and as a used car dealer, that he had been convicted numerous times under section 49 (now section 58) of The Highway Traffic Act and that there were judgments amounting to a substantial sum of money outstanding against him.

ORDERED: Registrar's proposal to refuse registration is confirmed.

CARLING CARS, ROSS POLLOCK
and JEAN POLLOCK

1971
SAULT STE. MARIE
OCTOBER 13TH

Applicants
and

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
F. PROUSE, S. M. MARMASH

COUNSEL: S. R. KURISKO for the Applicant
A. N. MAJAINA for the Respondent

OCTOBER 25, 1971

Registrar had refused to issue registrations under The Used Car Dealers Act, R.S.O. 1970, Chapter 475 to Applicants Carling Cars and Ross Pollock as used car dealers and to Applicant Jean Pollock as a used car salesman. Tribunal found Applicant Ross Pollock had carried on business as a used car dealer while unregistered notwithstanding his contention that Garage License Class A permitted him 'to deal in motor vehicles', that he had testified in his application for registration as a dealer that he would not be engaged in any other business which was untrue. Tribunal found Jean Pollock, a housewife with responsibilities for children, had no experience in the car business and could only devote part of her time to it.

ORDERED: Registrar's denial of registration is confirmed.

JOHN TINNEY MOTOR SALES and
JOHN CAMERON TINNEY

Applicants

1971
TORONTO
OCTOBER 26TH

and

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR,
R. J. RUMBLE

COUNSEL: MARTIN TEPLITSKY for Applicants
ADI N. MAJAINA for Respondent

NOVEMBER 8, 1971

The Registrar proposed to revoke or suspend the registrations of Applicants as used car dealer and salesman respectively on the grounds of breaches of The Used Car Dealers Act, R.S.O. 1970, Chapter 475 involving failure to enter upon sales and purchase orders the finance charges, dealer's and salesman's registration numbers, to keep records of reconditioning of vehicles, and to keep trust accounts and ledgers although reminded by Registrar's inspectors to do so. Further there was a conviction registered against Applicant Tinney for failure to supply a Certificate of Mechanical Fitness as required under The Highway Traffic Act R.S.O. 1960 Chapter 172. There was further evidence showing that such a Certificate had been issued without proper inspection of a vehicle, the use of which resulted in the joint deaths of two occupants. Evidence was adduced as to the good reputation of the Applicants in the community.

ORDERED: Revocation of the registrations suspended for one year subject to good behaviour.

ROBERT ROWE MOTORS LIMITED and
ROBERT HUGH ROWE
Applicants

1971
TORONTO
OCTOBER 29TH
NOVEMBER 1ST

and

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK, D. A. BAKER

COUNSEL: H. DOUGLAS STEWART for Applicants
A. N. MAJAINA for Respondent

NOVEMBER 10, 1971

Registrar had proposed to revoke or suspend registration of Applicants as motor vehicle dealer and salesman respectively on grounds that they had rolled-back odometers of used cars and had failed to record odometer readings on sales orders, both contrary to The Used Car Dealers Act, R.S.O. 1970 Chapter 475. Applicants admitted altering 48 odometers and having failed to record such odometer readings on documents of purchase and sale. Evidence of consumer satisfaction was presented and as to the good reputation of the Applicants in the community.

ORDERED: Revocation of registrations to be suspended for (approximately) one year subject to conditions imposed during such period.

WILLIAM GEORGE DOWLING*
Applicant

1971
TORONTO
DECEMBER 30TH

and

REGISTRAR OF USED CAR DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. H. LIND, R. J. RUMBLE

COUNSEL: G. A. WOOTTEN, Q.C. for Applicant
A. N. MAJAINA for Respondent

DECEMBER 30, 1971

The Applicant, applying for registration as a used car salesman, was offered such registration only on his first accepting onerous conditions which had been applied, with his consent, as terms to his continuing as proprietor of a substantial used car dealership (see Crang Plaza/Dowling case cited below). The Applicant, being unwilling or unable to meet such conditions as a used car dealer, made the application now under review, and applies to the Tribunal pursuant to section 7 of The Used Car Dealers Act, Revised Statutes of Ontario 1970, Chapter 475 for relief from the conditions which he alleges are inappropriate and harsh in the case of a salesman of a dealership in which he would have no present proprietary interest.

ORDERED: Applicant will be granted registration on less onerous terms and conditions namely, that he furnish a \$10,000 penalty bond and assume no proprietary interest in present or other dealership.

* See also Crang Plaza/Dowling and Registrar of Used Car Dealers and Salesmen, 8 September 1971, (page 15)

BRODER MOTOR SALES and
MRS. CLAUDETTE TELLIER
Applicants

1972
SUDBURY
JANUARY 26TH

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
D. J. McVITTIE, S. M. MARMASH

COUNSEL: EDWARD J. CONROY for Applicants
R. G. MacCORMAC, REGISTRAR, in person

FEBRUARY 11, 1972

Registrar had refused Applicants registrations as motor vehicle dealer and salesman respectively on the grounds that Applicant Mrs. Tellier and her husband had carried on business as used car dealers while not so registered in contravention of The Used Car Dealers Act 1968/69 S.O. 1968/69 and on the ground of lack of financial responsibility, from which decision Applicants required a hearing by the Tribunal under section 7 (1) of The Motor Vehicle Dealers Act R.S.O. 1970, Chapter 475. Evidence indicated no lack of financial responsibility and considerable experience in both sale and maintenance of automobiles and satisfactory premises. The case before the Tribunal of Carling Cars, Ross and Jean Pollock was distinguishable on the facts that here, the Telliers would be full-time operators.

ORDERED: Registrations as dealer and salesman to issue subject to conditions.

LLOYD McISAAC

Applicant

1972

TORONTO

FEBRUARY 9TH

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, M. FELDMAN

COUNSEL: HAROLD BOTNEK for the Applicant
A. N. MAJAINA for Respondent

FEBRUARY 23, 1972

Registrar refused Applicant registration as a salesman under The Motor Vehicle Dealers Act R.S.O. 1970, Chapter 475 on the grounds that Applicant had been convicted of carrying on business as a used car salesman while not registered as such and that he had subsequently continued to carry on such a business. Evidence including admissions by the Applicant established said conviction but no subsequent activity as a used car salesman. Evidence adduced indicated Applicant's only difficulties arose from association with a certain firm and there were no complaints against him.

ORDERED: Registration as a salesman to issue, subject to conditions.

LEO SMITH

1972

Applicant

TORONTO

FEBRUARY 29TH

MARCH 1ST

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK, A. D. SISLEYCOUNSEL: GEORGE A WOOTTEN, Q.C. for Applicant
A. N. MAJAINA for Respondent

MARCH 23, 1972

Registrar declined to register Applicant as a motor vehicle salesman on grounds of lack of financial responsibility and contraventions of The Motor Vehicle Dealers Act R.S.O. 1970 Chapter 475 involving the withholding of information properly producable and in including false answers to questions in a previous application for registration from which Applicant appeals under section 7 of The Motor Vehicle Dealers Act R.S.O. 1970 Chapter 475. Evidence showed Applicant and his wife, while operating an incorporated motor vehicle dealership for two years, had made assignments in bankruptcy indicating substantial insolvency. Applicant had previously become bankrupt and was subsequently discharged. The dealership registration had been obtained on basis of false and deceitful information supplied in connection with application for registration which was granted however subject to conditions. During the period of operation of the dealership Applicant had unlawfully and without justification kept back information from inspecting personnel from Registrar's office. The dealership had hired salesmen not registered under the Act, contrary to said Act, and persisted in publishing deceptive advertising after being lawfully directed to desist. The dealership had been convicted on more than one occasion for issuing false mechanical fitness certificates. Dealership had sold a motor vehicle representing it had title although such vehicle was subject to an undisclosed lien.

ORDERED: Registrar's proposal not to issue registration as a salesman is confirmed.

HARVEY GEORGE JONES
Applicant

1972
TORONTO
APRIL 5TH

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
S. M. MARMASH, P. VELENOSI

COUNSEL: GEORGE A. WOOTTEN, Q.C. for Applicant
SHEILA DIGNAN and A. N. MAJAINA
for Respondent

APRIL 17, 1972

Registrar declined to grant Applicant registration as a motor vehicle salesman under The Motor Vehicle Dealers Act R.S.O. 1970 Chapter 475 on grounds of a lack of financial responsibility and past conduct. Applicant admitted having, without the knowledge or approval of his employer motor vehicle dealer, sold vehicles and retained part of the proceeds and on another occasion had bought a motor vehicle without paying owner for same, and again had offered for sale motor vehicles on behalf of an unregistered dealer.

Evidence showed Applicant had absented himself from the automotive business for more than a year while rehabilitating himself from alcoholism.

ORDERED: Registrar to issue registration for probationary period subject to terms and conditions.

WILKINSON AUTO SALES, ARTHUR K. WILKINSON and
RODERICK McISAAC
Applicants

1972
TORONTO
FEBRUARY 1ST
APRIL 11TH

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H. F. H. SEDGWICK, G. D. MYERS

COUNSEL: GEORGE A. WOOTTEN, Q.C. for Roderick McIsaac
ROBERT CAPLAN for Wilkinson Auto Sales
and Arthur K. Wilkinson
ADI N. MAJAINA for Respondent

APRIL 24, 1972

Registrar proposed not to renew registration of Wilkinson Auto Sales as a dealer, to Arthur K. Wilkinson as salesman and to Roderick McIsaac, who had apparently engaged to purchase such dealership, as a dealer and salesman under The Motor Vehicle Dealers Act (formerly The Used Car Dealers Act) R.S.O. 1970 Chapter 475. In the case of Wilkinson the grounds for such refusal were that a condition which the Registrar had placed on Wilkinson had not been observed, namely that he had hired a named salesman while so prohibited. It was alleged against McIsaac that he had assisted his brother in selling cars while the latter was not a registered salesman. The Registrar concluded that it would not be in the public interest to grant any of the said registrations from which decision the Applicants appealed by way of requiring a hearing before the Tribunal. The evidence indicated the occurrence of the alleged infractions which however were totally inadvertent and that McIsaac had unwittingly operated the dealership while not so registered. It was also clear that there had been no injury to members of the public.

ORDERED: Registration of Roderick McIsaac as a dealer carrying on business as Roderick McIsaac Sales be granted and registration as a salesman to Roderick McIsaac and Arthur K. Wilkinson will issue and continue during a 20 month period, subject to conditions.

JACK JOSEPH JOHNSON

Applicant

1972

KINGSTON

APRIL 18TH

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
S. M. MARMASH, D. TAYLOR

PRESENT: THE APPLICANT, in person
ALAN W. ABRAMS, Acting Registrar

MAY 9, 1972

Registrar refused Applicant registration as a salesman under The Motor Vehicle Dealers Act, R.S.O. 1970, Chapter 475, as amended on grounds that his record as to financial responsibility and conduct was such that it would not be in the public interest to grant the registration applied for from which refusal Applicant now appeals to the Tribunal.

Evidence showed Applicant had had and lost conditional registration due to failing to live up to the terms thereof in having failed to make adjustment with a buyer in a transaction in which the buyer had suffered financial harm due to Applicant's misrepresentations. There was further evidence that Applicant had forged a signature to induce Registrar to renew Applicant's registration. Finally Applicant had made an assignment in bankruptcy and was undischarged at the time of the hearing.

ORDERED: Registrar's proposal not to issue registration is confirmed.

THOMAS LARIVIERE

Applicant ..

1972

TORONTO

MAY 8TH

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. H. MORNINGSTAR, J. HABERBUSCH

THOMAS LARIVIERE, Applicant, in person
SHEILA DIGNAN and A. N. MAJAINA
for Respondent

MAY 18, 1972

Registrar applied to the Tribunal for an order suspending or revoking Applicant's registration as a motor vehicle salesman pursuant to The Motor Vehicle Dealers Act (formerly The Used Car Dealers Act) R.S.O. 1970, Chapter 475 as amended by Statutes of Ontario 1971, Chapters 21 and 50. The grounds cited against the Applicant were that registration had been issued to him on the basis of false information supplied by him, and that there was a history of Applicant having defrauded members of the public with whom he had dealt as a licensed insurance agent for which he had been convicted, information concerning which had been improperly concealed from the Registrar.

ORDERED: Registrar's proposal to revoke Applicant's registration is confirmed.

RIVIERA MOTORS and RICHARD WRIGHT
Applicants

1972
TORONTO
MAY 15TH

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. H. MORNINGSTAR, W. SHANANAN

COUNSEL: APPLICANT WRIGHT, in person
A. N. MAJAINA for Respondent

JUNE 12, 1972

Registrar proposed not to renew registrations of Applicant dealership and salesman (Applicant Wright being sole proprietor of Riviera Motors) under The Motor Vehicle Dealers Act (formerly The Used Car Dealers Act) R.S.O. 1970 Chapter 475 as amended. The grounds for registration refusal were that there had been breaches of conditions imposed by the Registrar upon previously granted registrations, namely that there had been a conviction recorded against the dealership under The Highway Traffic Act, and that the dealership had sold used motor vehicles purporting to pass clear title whereas they were subject to subsisting liens for substantial sums of money. Evidence showed Applicant Wright had entered false information in the sworn application for dealership registration. Applicant admitted a conviction for false pretences.

ORDERED: Registrar's proposal not to renew dealership registration is confirmed, subject to suspension for a short period to permit winding up of the business.

McINERNEY MOTOR SALES and PHILIP J. McINERNEY
Applicants

1972
TORONTO
JUNE 19TH

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR and
FRANK ROWLAND

COUNSEL: APPLICANT McINERNEY, in person
A. N. MAJAINA and MISS SHEILA DIGNAN
for Respondent

JUNE 25, 1972

Hearing required pursuant to section 7 of The Motor Vehicle Dealers Act, R.S.O. 1970, Chapter 475, as amended, from Registrar's refusal to renew registrations of the Applicants as motor vehicle dealer and salesman respectively, communicated by the Registrar to the Applicants on April 10th, 1972 on stated grounds which, if proved, would disqualify Applicants under Section 5 of, and regulations made under, said Act.

In its reasons the Tribunal found Philip J. McInerney had been a used car salesman for ten years, and during the last year, a registered used car dealer, that he had furnished false information on applications for renewal of registrations, that he had failed to maintain a trust account of customers' moneys until required to do so, that he had failed to furnish information as to his financial condition when called on to do so, that there had been breaches of regulations 16 and 20 under The Motor Vehicle Dealers Act, and that he, and hence his dealership, were in precarious financial circumstances.

ORDERED: (1) Registrar's proposal to refuse renewal of registration of McInerney Motor Sales as a motor vehicle dealer confirmed but Registrar directed to grant interim registration only until August 30th, 1972 subject to conditions and (2) Registrar's proposal to refuse renewal of registration of Philip J. McInerney as salesman set aside and Registrar directed to renew such registration subject to conditions.

ALEXANDER LESLIE AND SUN MOTOR SALES

1972

TORONTO

JULY 20TH &
26TH

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR and
JACK T. HOGAN

COUNSEL: DOUGLAS E. ROLLO, Q.C., for Applicant
MISS SHEILA DIGNAN, for Respondent

AUGUST 4, 1972

Hearing pursuant to Section 7 of The Motor Vehicle Dealers Act, R.S.O. 1970, Chapter 475, as amended, arising from Registrar's refusal to grant registration as a motor vehicle dealer and, as a salesman, to Applicant Alexander Leslie carrying on business under the name and style of Sun Motor Sales, communicated to Applicant on June 16th, 1972 on stated grounds which, if proved, would disqualify the Applicant under Section 5 of, and regulations made under, said Act.

In its reasons the Tribunal found that previous dealership of Applicant had been guilty of breaches of conduct prescribed under the former Used Car Dealers Act as a result of which Applicant as a motor vehicle dealer and salesman had been reprimanded and had had such registrations withdrawn, that it was not proved that Applicant was the principal of a motor vehicle dealership whose registration had been cancelled due to disqualification but was a mere salesman thereat, that Applicant had a clear record over last three years and finally that Applicant's financial position was such as to indicate financial responsibility.

ORDERED: Registrar's proposed denial of registration set aside and Registrar directed to grant Applicant registration as a motor vehicle dealer and as a salesman for a probationary period subject to terms and conditions.

LAWRENCE JOHN SMITH

Applicant

1972

TORONTO

AUGUST 18TH

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS and JAMES F. KENNEDY
PRESENT: Applicant, in person
R. G. MacCormac, Respondent

SEPTEMBER 5, 1972

Hearing required pursuant to Section 7 of The Motor Vehicle Dealers Act, R.S.O. 1970, Chapter 475, as amended, from Registrar's refusal to grant registration as a salesman communicated to Applicant on July 18th, 1972 on stated grounds which, if proved, would disqualify the Applicant under Section 5 of, and Regulations made under, said Act.

The Tribunal found Applicant admitted particulars complained of by the Registrar as grounds for his refusal of registration, namely that Applicant had failed to disclose in his application that he had been imprisoned during the past three years, that he had been convicted of criminal offences in 1969 and 1970, that he had failed to comply with probation orders issued from the Criminal Court in the matter of sentence and was under a duty to answer such charges and that there were further criminal charges against the Applicant pending relating to public mischief and false pretences. The Tribunal further found that the Applicant had a previous good record and would possibly benefit from punishment already received with the chance of rehabilitating himself through employment.

ORDERED: Registrar's proposed denial of registration set aside and Registrar directed to grant Applicant registration as a salesman for a probationary period subject to terms and conditions.

FERNANDO GIARDINO & ATIKOKAN MOTOR SALES

Applicants

1972

THUNDER BAY

NOVEMBER 27TH

and

GISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
WALTER H. LIND and FRANKLIN D. PROUSE

COUNSEL: D. J. THRASHER for Applicants
A. W. ABRAMS, Chief Inspector, Motor Vehicle
Dealers for Respondent

NOVEMBER 27, 1972

Hearing required from Registrar's action on October 11th, 1972 suspending for three months the registrations of Atikokan Motor Sales as a motor vehicle dealer and Fernando Giardino as a registered salesman of such dealer under The Motor Vehicle Dealers Act, R.S.O. 1970, Chapter 475, as amended.

The Tribunal found the particulars alleged in the Registrar's decision under review to be proved namely, Applicant had carried on business as a used car dealer while not registered as such, had been convicted of issuing false certificate of mechanical fitness and for failing to deliver other certificates of mechanical fitness and for failing to record odometer readings in sales records.

ORDERED: (orally) Registrar's action in suspending Applicants for three months confirmed, Order to go suspending for three months from December 1st, 1972 to February 28th, 1973.

ERNEST HODGKINSON

Applicant

1971

TORONTO

MAY 18TH

JUNE 8TH

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK, A. A. TAKEFMAN

COUNSEL: A. N. MAJAINA and R. H. LEWIS
for Respondent
ERNEST HODGKINSON on his own behalf

JUNE 17, 1971

Registrar refused registration to Applicant as a real estate broker under The Real Estate and Business Brokers Act R.S.O. 1960, Chapter 344 alleging Applicant unfitted through past experience. Applicant applies for redress on grounds that he had been a registered salesman for 6 months, and sales manager of a land company for approximately 6 years and had successfully carried on as a salesman for a further period.

ORDERED: On basis of related experience Applicant was entitled to registration and directed the Registrar to issue registration forthwith.

DOUGLAS FOREST SNELL and
LUDMILA ROXANA BROWN

Applicants

1971
TORONTO
JUNE 2ND
JUNE 14TH
JUNE 16TH

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, T. G. CHAMBERS

COUNSEL: G. W. BAGWELL, Q.C. for Applicant Brown (June 14, 16)
PERCE YOUNG for Applicant Snell (June 14, 16)
A. N. MAJAINA for Respondent

JULY 7, 1971

Hearing held pursuant to sections 6, 8(1) and 9 of The Real Estate and Business Brokers Act, R.S.O. 1960, Chapter 344, as amended, by way of an application by the Registrar to the Tribunal for revocation of the registrations of the Applicants herein as real estate salesmen by reason of their failure to disclose material facts to their principal, a real estate broker, in connection with a series of real estate transactions.

The evidence, which was not seriously challenged, was that Applicants, acting in concert and by means of fictitious names, had succeeded in obtaining acceptance of "offers" in respect of four parcels of real estate from unsuspecting vendors dealing in good faith with the Applicants' employer broker. This conduct was contrary to section 49 which requires full disclosure to the vendor of purchases for one's own account. The offers involved lengthy periods to closing and misrepresentations as to the financial abilities of the undisclosed 'purchasers' and all four deals became abortive, to the injury of the would-be vendors.

ORDERED: Suspension of registration of both Applicants for two years.

CARL P. LAUSHWAY

Applicant

1971

TORONTO

OCTOBER 4TH

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
R. G. WAY, S. M. MARMASH

COUNSEL: A. N. MAJAINA for Respondent

OCTOBER 14, 1971

Registrar proposed to revoke Applicant's registration as a real estate broker under The Real Estate and Business Brokers Act, R.S.O. 1970, Chapter 401 on grounds that Applicant wilfully misrepresented facts in his sworn application for registration, that he refused to attend and without excuse failed to attend meetings with the Registrar although required by the Act to do so, that he failed to maintain trust accounts and failed to account for trust funds, and that he failed to notify Registrar of a change of his business address. Applicant did not appear.

ORDERED: Registrar's decision to revoke is sustained.

A. R. FERA

Applicant

1971

TORONTO

DECEMBER 2ND

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK, JAN JUSTIN

COUNSEL: LAWRENCE S. CROSSMAN for Applicant
ADI N. MAJAINA for Respondent

DECEMBER 13, 1971

Registrar proposed to refuse renewal of Applicant's registration as a real estate broker under The Real Estate and Business Brokers Act, R.S.O. 1960, Chapter 344 as amended on grounds alleged that Applicant had failed: 1] to maintain proper records of transactions although instructed and advised to do so, 2] to maintain trust accounts as required by the Act, 3] deliberately obstructed duly appointed inspectors in carrying out their duties and 4] withheld from them and/or destroyed records, both contrary to the Act, and 5] to attend a meeting with the Registrar without lawful excuse as required by the Act. Tribunal found allegations substantially proved but that there were extenuating circumstances.

ORDERED: Registrar to renew registration of Applicant on terms and conditions.

RONALD E. MASTERS

Applicant

1972
TORONTO
FEBRUARY 15

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MISS MARGARET MEINDL
S. M. MARMASH

COUNSEL: MISS SHEILA DIGNAN and ADI N. MAJAINA
for Respondent

FEBRUARY 15, 1972

Registrar refused registration to Applicant as a salesman under The Real Estate and Business Brokers Act, R.S.O. 1970 Chapter 401 on the basis that Applicant was an undischarged bankrupt and that it was contrary to the policy of the Registrar in the public interest to do so. Evidence indicated the Applicant had been a registered security dealer, that he had passed the real estate examinations and had been employed as a registered real estate salesman, that his health had not been good for a time and that he had gotten heavily into debt, that he had been offered employment as a salesman even in the present circumstances of bankruptcy. Character evidence favourable to Applicant was presented. The above evidence was uncontroverted.

ORDERED: Registrar's decision to refuse registration is sustained; registration to issue upon Applicant's discharge from bankruptcy.

GLENN COOK

Applicant

1972

TORONTO

MARCH 15TH

and

GISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H. F. H. SEDGWICK, M. LAMOND

COUNSEL: APPLICANT in person
SHEILA DIGNAN and ADI N. MAJAINA
for Respondent

MARCH 27, 1972

Registrar refused registration to Applicant as a salesman under The Real Estate and Business Brokers Act, R.S.O. 1970, Chapter 401 on grounds of lack of financial responsibility or that Applicant's record of past conduct is such that it would not be in public interest to grant registration. Evidence was undisputed that he had been convicted of fraud in connection with the loss of a large sum of money and had been sentenced to five years imprisonment in 1970, and that, in order to assist in recovering the lost assets, he had made a voluntary assignment in bankruptcy. Evidence indicated further that after being paroled Applicant had a chance of employment, that he felt his debt to society had been paid.

ORDERED: Registrar's decision to refuse registration is sustained.

MICHAEL LENCHYSHYN ..

Applicant

and

1972

ST. CATHARINE

NOVEMBER 13T

to 17TH, inclusiv

TORONTO

NOVEMBER 23R

and 24TH

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
WALTER H. LIND and DONALD ALSOP

COUNSEL: RONALD GREENSPAN for Applicant
A. N. MAJAINA for Respondent

DECEMBER 8, 1972

Hearing required by Applicant from Registrar's refusal on June 27, 1972 to renew his registration as a real estate salesman under The Real Estate and Business Brokers Act, R.S.O. 1970, Chapter 401, as amended, on stated grounds including lack of financial responsibility due to personal financial insecurity, past conduct in unauthorized trading in real estate as a broker while not so licensed and in obtaining credit and loans of money through false pretences and in falsely testifying in sworn applications for registration.

In its reasons the Tribunal found as a matter of evidence, that: (1) Applicant admitted furnishing false information of substance in successive applications for renewal of registration; (2) Applicant was guilty in one instance of gross misrepresentation as to profitability of a motel property; (3) Applicant borrowed money from associates making false or insincere promises of repayment and, in one case, of marriage; (4) There were unsatisfied judgments and debts against the Applicant amounting in aggregate to approximately \$38,600., and that his consequent net worth was in a deficit position.

Tribunal found that Applicant's financial position was inconsistent with financial responsibility and that his past conduct would not be consistent with carrying on business in accordance with integrity and honesty.

ORDERED: Registrar directed to suspend Applicant's registration for two years from date of order.

1A26N
CC 40
- 056

GOVT PUBNS

Commercial Registration Appeal Tribunal

Summaries of Decisions
Volume 2



Ontario

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS - VOLUME 2

(Decisions during 1973)

These are summaries of all decisions and reasons released by the Tribunal during 1973. If reference to the full text of a decision is desired application should be made to the Tribunal's office, Toronto, Ontario

Published pursuant to The Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario 1970, Chapter 113.



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TABLE OF CASES SUMMARIZED

The Consumer Protection Act

	<u>Page</u>
Brother Sewing Centres	1
Capital Sewing Centre Limited	6
Davka Sales & Distributors Limited	4
Ernest Goetz Enterprises Limited	1

The Mortgage Brokers Act

A. M. Greenaway & Company Limited	7
Argosy Investments Limited	11
Dawaca Holdings	11
Gordon, L.	9
Walker, David A.	11

The Motor Vehicle Dealers Act

Andy, Michael	36
Austin, Lawrence B.	29
Calderone, Peter	17
Camp Cars Limited	12
Cross-Canada Car Leasing Limited	12
Dennis, Harry Edward	22
Don Howson Chevrolet Oldsmobile Limited	33
Don Mills Auto Sales	31
Harris, Alan H.	25
Henry, William P.	30
Howson, C. Donald	33
Kert, Claude	16
Kimmerly, Calvin Leroy	31
Kitchener British Cars	22
MacDonald, Donald A. I	21
MacDonald, Donald A. II	27
Motorcycles Galore (California Custom Cycle)	25
P.C. Auto Sales	17

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TABLE OF CASES SUMMARIZED

The Motor Vehicle Dealers Act (cont'd)

	<u>Page</u>
Port Credit Motors	30
Robertson, David Allen	14
Roddy, William Robert	19
Town & Country Motors I	21
Town & Country Motors II	27
Victoria Motor Sales (Kitchener) Ltd.	22
White, William Elgas	24

The Real Estate and Business Brokers Act

Axler, Joseph L.	37
Axler & Palmer Limited	37
Buckland, Graham	39
Valevicius, H. Joseph	40

ERNEST GOETZ ENTERPRISES LIMITED*

trading as

BROTHER SEWING CENTRES

1972

TORONTO

JUNE 6

OCT. 31

NOV. 1 - 3

Applicant

1973

TORONTO

JAN. 30/31

FEB. 1/2

REGISTRAR OF CONSUMER PROTECTION BUREAU

" 12

" 14 - 16

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 WALTER H. LIND and DAVID L. GIBSON
 MEMBERS

COUNSEL: A. N. MAJAINA and MRS. DIANE STORTINI
 for Respondent
 ERNEST GOETZ as agent for Applicant

APRIL 26th, 1973

Applicant, an itinerant seller as defined in The Consumer Protection Act, was registered thereunder, having first become registered in 1968 while trading under the name Good Housekeeping Centres, subsequently under the name Trans-Canada Sewing Centre and finally under the name Brother Sewing Centres. At the material times the active officers and directors were Ernest Goetz, President, his wife Renate Goetz, Secretary-Treasurer and Dina Goetz, mother of said Ernest Goetz, director. Applicant corporation offered for sale at its place of business and elsewhere, sewing machines, household vacuum cleaners, electronic home entertainment equipment, household utensils and appliances and services in connection therewith. Respondent notified Applicant by written notice of March 14th, 1972 of Respondent's proposed order made under section 47 of The Consumer Protection Act to cease using certain clearly specified advertising and promotion material and methods as being false, misleading or deceptive. In such Notice Applicant was further advised of Respondent's proposed order made under section 7 of said Act to refuse Applicant

(cont'd)

*(See Davka Sales & Distributors Limited case
 at p. 4 this Volume)

a renewal of registration as an itinerant seller on grounds specified in detail upon which grounds he based his finding that Applicant was not financially responsible, or its record of past conduct and that of its President Ernest Goetz were such as to disentitle it to renewal of registration in the public interest and that, if registered, it would operate in contravention of said Act as it had in the past. Applicant duly applied to the Tribunal for relief from the effect of the aforementioned cessation order and refusal of registration by way of a hearing as provided in section 7 of said Act.

Applicant did not deny having used the promotional material and methods complained of including a crossword puzzle easily solvable and when sent in became an entry in a "contest" to win a sewing machine. Apparently every "contestant" received a mailing piece including a letter "congratulating" the contestant on winning a "consolation price" by way of a "cheque" or "profit sharing bonus" for \$60.00 or more which was in reality an offer of a discount to every "contestant" who purchased merchandise in excess of a certain value. Variations of the same "contest" were also conducted at home or domestic products exhibitions and shows with the same characteristic that every entrant "won" a "consolation prize". Such "contest" produced a mailing list for future use. The same promotion was extended to householders picked at random by direct mail without the pretense of a contest.

Applicant admitted advertising sewing machines at ridiculously low prices as seconds or manufacturers' "goofs". Evidence showed customers thus lured into Applicant's place of business were quickly "switched" to regular, and more expensive, models - the so-called "bait and switch" technique - which proved most effective with new Canadians not proficient in English and often unsophisticated in North American business methods. Confusion was deliberately created by substitution of products with similar names, by requiring conditional sales contracts and wage assignments to be completed even in cash transactions and by the juggling of business names between Brother Sewing Centres, Brother Sewing Circle and Brother Sales and Service, ostensibly different businesses but operating at various times from the same address. Thus Goetz's name became E. Guy or Ernie Guy at different times and his wife's name underwent alteration. Another trick involved obtaining customers' signed cheques with payee, and sometimes even the date, left blank so it became impossible to effect "stop payment". Cheques would then be hastily presented on behalf of individual names other than Applicant's business name and unknown to the unsuspecting maker of the cheque.

(cont'd)

Evidence by investigators authorized to inspect business records of Applicant showed the protective requirements of The Consumer Protection Act were not observed in the matter of maintenance of records of trust moneys, and in the illegal use of inappropriate and incorrect business forms.

Applicant's explanations were unsatisfactory in that they were uncorroborated, full of discrepancies and for the most part self-serving and untrustworthy.

Tribunal found:

- a) the advertising and promotional methods not merely questionable but deceitful and calculated to mislead the public;
- b) the selling methods were "high pressure", tricky and sometimes fraudulent;
- c) although Applicant represented its merchandise as world famous machines and not "off brands or promotional machines", the contrary was true and there were many sales of the latter type;
- d) in the matter of Applicant's much vaunted "service guarantees and warranties", Applicant failed in many cases to supply any guarantee or warranty and there was, in fact, no significant service or follow-up of customer complaints and the rare warranties offered were those of the manufacturers.

ORDERED: Applicant will cease using and hereafter desist from using the objectionable advertising and promotional material specified; Applicant's registration as itinerant seller is revoked.

DAVKA SALES & DISTRIBUTORS LIMITED	*	1972
Applicant		TORONTO
and		JUNE 6
		OCT. 31
		NOV. 1 - 3
REGISTRAR OF CONSUMER PROTECTION BUREAU		1973
Respondent		TORONTO
		JAN. 30/31
		FEB. 1/2
		" 12
		" 14 - 16
TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN		
WALTER H. LIND and DAVID L. GIBSON		
MEMBERS		
COUNSEL: A. N. MAJAINA and MRS. DIANE STORTINI		
for Respondent		
ERNEST GOETZ as agent for Applicant		

APRIL 26TH, 1973

Applicant, an itinerant seller, having applied for registration under The Consumer Protection Act for the first time in 1972, Respondent Registrar proposed to refuse same and Applicant thereupon requested a hearing by way of review of the Registrar's proposed decision. The matter was heard simultaneously with the hearing held at the request of Ernest Goetz Enterprises Limited, a registered itinerant seller, on consent of all parties. The President of Ernest Goetz Enterprises Limited, Ernest Goetz, represented this Applicant as agent during the joint hearing.

Notice of such denial of registration was communicated to Applicant by notice dated May 29, 1973, wherein the Registrar set forth his reasons therefor and grounds, namely, that Applicant would lack financial responsibility due to its financial position, that it would not carry on business legally and with integrity and honesty, and that its officers were already conducting, or had conducted, activities in breach of the said Act or Regulations. Particulars of such alleged lack of business integrity and honesty and illegal conduct as furnished in said notice included complaints that Applicant, through its President, Renate Goetz (or Renee Skeris) had furnished significantly false information in its application, that in any case Applicant would be a

(cont'd)

*(See also Ernest Goetz Enterprises Limited case at p. 1 this Volume)

'front' for Ernest Goetz Enterprises Limited of the same address, a registrant already the subject of, and allegedly in breach of, a cease and desist order under section 47 of the Act and of a proposed order denying renewal of registration.

It was admitted that Applicant company, which had been incorporated in 1972 shortly before its application for registration, was located at the same address and used the same telephone number as Ernest Goetz Enterprises Limited, also listed for Renate Goetz, President of Applicant and who had for some years been an officer and a salaried employee of said Company, and that one Maurice Cohen, Applicant's Secretary-Treasurer, was also an employee of the said Company.

Evidence indicated Applicant's officers, Renate Goetz and Maurice Cohen with Ernest Goetz and Ernest Goetz Enterprises Limited had jointly and severally published the same kind of objectionable advertising complained of against Ernest Goetz Enterprises Limited and ordered stopped by the Registrar by his recent order against it and Tribunal found Applicant to have been formed as a means of circumventing such order.

Tribunal found Renate Goetz had furnished false information in answering a number of questions in Applicant Company's application as alleged by Respondent. Tribunal further found Renate Goetz was, in fact, an officer of Ernest Goetz Enterprises Limited, a fact she falsely failed to testify to in the said application. Tribunal further found Applicant was, in every sense, the alter ego of Ernest Goetz Enterprises Limited, with same faults and lack of financial responsibility, and that its Officers were guilty of same conduct and equally lacking in integrity and honesty, all as found against Ernest Goetz Enterprises Limited.

ORDERED: Registrar's refusal of registration confirmed.

CAPITAL SEWING CENTRES LIMITED

Applicant

1973
TORONTO
AUG. 8

and

REGISTRAR OF CONSUMER PROTECTION BUREAU

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 MRS. HELEN J. MORNINGSTAR and
 DAVID L. GIBSON, MEMBERS

COUNSEL: P. T. MATLOW for Applicant
 MISS M. V. MACLEAN and
 A. N. MAJAINA for Respondent

AUGUST 15TH, 1973

Applicant, a registered itinerant seller under The Consumer Protection Act, proceeding under section 7 of said Act, required a hearing by way of review of an order of the Registrar made under section 47 of the said Act directing immediate cessation of the use by Applicant of certain forms of advertising by circulars, pamphlets and other material as described in detail in such order. The Registrar's order of prohibition was extended to include several incorporated and unincorporated organizations trading under names similar to the name of Applicant.

The evidence indicated that the advertising and promotional material complained of was much the same as that found to be objectionable by the Tribunal in its recent decision in the matter of Ernest Goetz Enterprises Limited (trading as Brother Sewing Centres) as also containing false, misleading and deceptive statements apparently calculated to lure unwary customers to Applicant's business premises.

Applicant, through its counsel, consented to the Registrar's said order becoming final and the Tribunal concurred.

ORDERED: Registrar's proposed order directing Applicant to cease and desist in advertising and promoting sales by the means specified shall be final.

A. M. GREENAWAY & COMPANY LIMITED
 Applicant

1973
 TORONTO
 JAN. 16

and

REGISTRAR OF MORTGAGE BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 WATSON W. EVANS, MURRAY H. LEFF,
 MEMBERS

COUNSEL: J. R. HUNTER, Q.C., for Applicant
 R. H. LEWIS for Respondent

FEBRUARY 12TH, 1973

A hearing was required by Applicant pursuant to section 7 of The Mortgage Brokers Act for the purpose of a review of the Registrar's proposal to refuse a renewal of his registration as mortgage broker as notified by the Registrar's letter of July 11th, 1972 specifying reasons for such refusal.

Applicant, an Ontario corporation, had been incorporated in 1960 with the objects of a mortgage brokerage business and forthwith became registered and commenced business. A. M. Greenaway was and is its major shareholder, only active director and officer, now aged 75, has been in the mortgage business for more than 50 years.

In 1971 Applicant's registration was granted conditionally on terms set forth in detail by the Registrar in a letter dated May 19th, 1971 following a hearing by the Advisory Board under the former Mortgage Brokers Registration Act. In July 1972 Applicant's application for renewal of registration was rejected as above mentioned for reasons which may be generally described as a) fiscal unsoundness indicating a lack of financial responsibility, b) unsatisfactory past conduct of A. M. Greenaway, its chief officer, indicating the business would not be conducted with integrity and honesty, c) past breaches of Regulations 3(8) and 3(11) in regard to the furnishing of mortgage statements to

(cont'd)

borrowers and d) numerous past and continuing breaches of the terms and conditions imposed upon its grant of registration.

As to a) unaudited balance sheets of, and produced by, the Applicant indicated assets of no worth carried at substantial values, inflated values under goodwill, furniture at undepreciated values and a resulting surplus whereas, in fact, there was a deficit and deficiency in working capital. One of the conditions above referred to was that Applicant satisfy the substantial judgments against it and this had only been done since requiring this hearing, indeed in one instance, on the day of the hearing. As to b) Greenaway charged clients a lawyer's fee which represented no outlay but a fictitious charge for conveyancing contrary to the Act. As to c) Applicant had failed to furnish borrowers with required statements of mortgage contrary to Regulation 3(8) although there had been partial compliance. As to d) Company's defaults were chiefly in regard to supplying Registrar with audited financial statements in response to his proper demands, failing to settle outstanding judgments against the Company, and in neglecting to correct irregularities in connection with specific transactions. Breaches in all these matters was proved to Tribunal's satisfaction.

Tribunal found - Applicant Company was in fact insolvent and therefore cannot be expected to be financially responsible in the conduct of its business; that A. M. Greenaway, its President, only active director and officer has exhibited such degree of laxity in performance of conditions imposed upon Applicant's registration and in the conduct of its operations that it cannot be expected that the business will be carried on in accordance with law, integrity and honesty; that Applicant was guilty of breaches of The Mortgage Brokers Act and Regulations by contravening sections 3(8) and 3(11) and Regulation 461/71.

ORDERED: Registrar's proposal to deny registration is confirmed, revocation to take effect on April 1st, 1973.

L. GORDON

1973

Applicant

TORONTO

SEPT. 11, 12,
13, 25 & 26

and

REGISTRAR OF MORTGAGE BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 H. F. H. SEDGWICK, STEPHEN S. WILSON,
 MEMBERS

COUNSEL: R. WISE for Applicant
 A. N. MAJAINA and MISS M. V. MacLEAN,
 for Respondent

OCTOBER 17TH, 1973

Applicant, proceeding under section 7 of The Mortgage Brokers Act, required a hearing by way of review of the Registrar's proposal to refuse Applicant's application for renewal of his registration as a mortgage broker as communicated to him by the Registrar's letter notices dated July 4th and 5th, 1972 for the reasons stated therein.

Applicant, a certified public accountant since 1947, had become registered first as a mortgage broker in 1971. Beginning in 1962 he had devoted more time to dealing in real estate and mortgages on his own account and for clients than to his accountancy practice. In a declaration of business made by Applicant in November 1971 under The Partnership Registration Act and duly registered in the Registry Office for the County of Peel, Brampton, Ontario he stated he was carrying on business as a mortgage and business consultant in Toronto under the name of Lawrence Gordon and Associates, that such name had been first used by him in October 1971 and that no other person was associated with him in such business. In August 1973 he caused "L. Gordon & Associates", mortgage and business consultants, to be registered with the Registry of Partnerships, Companies Division, Ministry of Consumer and Commercial Relations, declaring himself sole proprietor thereof as of June 1971 and simultaneously caused "L. Gordon & Co.",

accountants to be registered with said Ministry declaring himself sole proprietor. His license as a part-time public accountant was in 1971 issued to "M. L. Gordon & Co.", in 1972 as "L. Gordon" and in 1973 as "L. Gordon & Associates". Evidence indicated Applicant had carried on his business as a mortgage broker under "L. Gordon & Associates" at a time when such business was registered under The Mortgage Brokers Act as "L. Gordon - Mortgage Broker". The Mortgage Brokers Act provides in section 4 that a registered mortgage broker shall not carry on business in a name other than the name in which he is registered.

Evidence indicated Applicant's business had in two transactions in 1972 received substantial sums of money which were not applied in the manner required by Regulation 5 made under said Act, viz. deposited in a trust bank or trust company account designated as such. Applicant claimed such moneys were within the exception provided in Regulation 5(1) as fees earned or "holding fees". When these mortgage agreements became abortive such funds were transferred into the business general account and were only transferred to a bank trust account when demanded by the Registrar that they be so held pending the result of litigation concerning them.

The Tribunal found Applicant had

- a) carried on the business of mortgage broker under names other than as registered
- b) the deposits above mentioned were not deposited in a trust account in time and were illegally removed therefrom
- c) failed to notify Registrar of changes of personnel employed as required by Regulations under said Act
- d) failed to furnish borrowers with mortgage statement as required by Regulations under said Act
- e) failed to maintain a trust account so designated as required by Regulations under said Act.

ORDERED: Applicant's registration to be revoked for period of four months and, if reissued, to be subject to conditions.

ARGOSY INVESTMENTS LIMITED and
DAVID A. WALKER carrying on business as
DAWACA HOLDINGS

1973
TORONTO
DEC. 10

Applicants

and

REGISTRAR OF MORTGAGE BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN J. MORNINGSTAR, and
MURRAY SUSSMAN, MEMBERS

COUNSEL: WILFRID L. S. TRIVETT, Q.C. for Applicants
A. N. MAJAINA, for Respondent

DECEMBER 10TH, 1973

Applicants, both registered mortgage brokers, had been the subject of a proposed order of the Registrar made on August 10, 1973 under section 7 (2) of The Mortgage Brokers Act to revoke their registrations for reasons furnished therein and Applicants duly requested a hearing by way of appeal therefrom. A date for such hearing having been fixed, the parties agreed to postpone a hearing to permit negotiations between them to continue which culminated in an agreement. The parties then requested the Tribunal to dispose of the proceedings by its consent order and waived a hearing pursuant to section 4 of The Statutory Powers Procedure Act, 1971 and other pertinent legislation.

The Tribunal upon receiving the said agreement between the parties accordingly directed that the proceedings be disposed of without a hearing and ordered revocation of the registration of Applicant David A. Walker and the continuance of the registration of Applicant Argosy Investments Limited subject to all the terms and conditions stipulated in the said agreement adding a further restraint affecting a certain employee of the Applicants.

ORDERED: Revocation of Applicant Walker; terms and conditions as agreed to and supplemented as aforesaid to apply to Argosy Investments' registration provided any breach thereof to bring immediate revocation.

CAMP CARS LIMITED and CROSS-CANADA
CAR LEASING LIMITED*

1973
TORONTO
JAN. 9, 10, 11

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR,
F. WILLIAM DALGLISH, MEMBERS

COUNSEL: W. J. SMITH, Q.C. and S. H. STARKMAN
for Applicants
CLAY M. POWELL, for Respondent

JANUARY 26TH, 1973

Camp Cars Limited, a registered motor vehicle dealer, and Cross-Canada Car Leasing Limited, also so registered although chiefly engaged in long-term leasing of motor vehicles through a number of outlets in Canada, required hearings under section 7 of The Motor Vehicle Dealers Act for review of written decisions of the Registrar wherein he proposed to revoke their respective registrations for reasons stated therein. The parties consenting, the matters were heard together and in conjunction with the matter regarding David Allen Robertson, an applicant for registration as a motor vehicle dealer intending to trade under the name of Unionville Motors (1972) and who had been denied such registration by a decision of the Registrar for stated reasons which were, briefly put, because of his association as director and secretary-treasurer of Camp Cars Limited and Cross-Canada Car Leasing Limited (hereinafter referred to collectively as "the corporate applicants"). The Registrar's complaints against the corporate applicants on which he based his proposed revocations concerned allegations of "rolling-back" odometers of 120 automobiles subsequently sold at wholesale and retail to the detriment of the purchasers. It was further alleged

(cont'd)

* (See decision of Tribunal in re. David Allen Robertson at p. 14 in this Volume of Summaries of Decisions)

that, where mileages were thus reduced below the 50,000 mile warranty limit, it gave rise to unjustified warranty claims against the car manufacturers to their loss.

Cross-Canada Car Leasing Limited had first been registered as a used car dealer in Ontario in April 1965. Camp Cars was first registered as a used car dealer in December 1971. The directors and officers of both corporations are Grover Camp Robertson, president of both companies, David Allen Robertson, secretary-treasurer of both companies and D. B. Hethrington. In March 1971 William Gow became a director of Cross-Canada. Both companies operated in Toronto from common premises which was also the location of their head offices.

Cross-Canada had a growing volume of cars on the road under one or two year leases and hence found itself with large numbers of lease-spent cars to be disposed of. So, for example, between April and July in 1972 there were 836 units to be disposed of through auctions and other outlets, many with high mileages, and it proved difficult to dispose of these to advantage especially after the change in Ontario law in March 1971 prohibiting the turning back of odometers. Camp Cars, wholly-owned by the owner of Cross-Canada, became the favoured outlet for disposal of the better quality used cars of the latter.

Evidence, which was not seriously challenged, indicated that the corporate Applicants through their senior executives above-mentioned (other than David Allen Robertson) conspired to "roll-back" the odometers of 120 of the higher mileage automobiles in their joint inventory in an average amount of approximately 13,000 miles per car or a total in excess of 1,600,000 miles. In reply they could only say it was not for the purpose of obtaining higher prices but only to make it possible to "move", i.e. sell, the higher mileage vehicles. However there was evidence that lower mileage cars were apparently dealt with in the same way. The practice of "rolling-back" apparently continued until October 1972 when it was stopped apparently as the result of an investigation ordered by the Director, Business Practices Division, of The Ministry of Consumer and Commercial Relations. When discovered, the senior officers of the corporate Applicants took steps, albeit not as promptly as possible, to order the practice stopped and to make adjustments with any purchasers who complained. The principals acknowledged that the practice, which they averred had been widespread in the industry, was unfair to unsuspecting purchasers and to scrupulous competitors alike.

ORDERED: That revocation of the registrations of the corporate Applicants proposed by the Registrar is confirmed to become effective May 1st, 1973.

DAVID ALLEN ROBERTSON*

Applicant

1972
TORONTO
Dec. 5

and

1973
TORONTO
JAN. 9,
10 & 11

REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR,
F. WILLIAM DALGLISH, MEMBERSCOUNSEL: W. J. SMITH, Q.C., and S. H. STARKMAN
, for Applicants
CLAY M. POWELL for Respondent

JANUARY 26, 1973

Proceeding pursuant to section 7 of The Motor Vehicle Dealers Act, the Applicant required a hearing regarding the Registrar's denial of his application for registration as a motor vehicle dealer. In deciding against the Applicant the Registrar relied on certain allegations raised against Camp Cars Limited and Cross-Canada Car Leasing Limited ("the corporate Applicants") and their senior officers of having "rolled-back" odometers*. The Registrar, in his decision against this Applicant, imputed to him actual or constructive knowledge of, and responsibility for, those acts complained of against the senior officers of the corporate Applicants because this Applicant was in fact, a director and officer of each. With the consent of counsel for the Registrar and of counsel representing both this Applicant and the corporate Applicants the Tribunal proceeded to conduct the hearings together and, except for character evidence in respect of the Applicant taken on December 5th, the evidence in both matters was heard together. It appeared that the Applicant was seeking registration as a motor vehicle dealer under the name of Unionville Motors (1972).

(cont'd)

*See decision in Camp Cars Limited and Cross-Canada Car Leasing Limited at p. 12 of this Volume.

It was urged upon the Tribunal that the evidence of the "rolling-back" of odometers proved to have been consciously and deliberately carried out by the senior executives of the corporate Applicants, whose registrations were thereby placed in jeopardy, should be equally imputed to the Applicant through knowledge or, alternatively by reason of statutory enactment, that a corporate director and officer would be required not only to exercise the duties but also to accept the responsibilities consonant with such positions. The Tribunal found the Applicant free of actual knowledge and involvement in the "rolling-back" operations found against the corporate Applicants and the Tribunal further declined to find this Applicant legally responsible for such actions. Evidence of good character of the Applicant and competence in the automobile business was adduced without rebuttal.

ORDERED: That the Registrar grant conditional registration as a motor vehicle dealer to the Applicant.

CLAUDE KERT

Applicant

1973
TORONTO
JAN. 22

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 WATSON W. EVANS, ROBERT H. FOSTER
 MEMBERS

COUNSEL: RICHARD D. BROUGHTON for Applicant
 ADI N. MAJAINA and MRS. D. STORTINI
 for Respondent

JANUARY 30TH, 1973

Proceeding pursuant to section 7 of The Motor Vehicle Dealers Act the Applicant required a hearing by way of appeal from the Registrar's decision dated November 6, 1972 denying him registration as a motor vehicle salesman. There was evidence that Applicant had been twice convicted in 1972 in Provincial Court on two counts involving breaches of The Motor Vehicle Dealers Act namely, of section 3, subsection 1 (b), in that he had during 1971 and 1972 respectively acted as a salesman of used cars while not so registered, made offences by section 33 of said Act. There was further unchallenged evidence that Applicant had subsequently continued to carry on business as dealer and salesman at various times while not so registered and that Applicant had testified falsely regarding these activities in two sworn applications for registration, also made offences in said section 33. In explanation, evidence was brought by Applicant that his occupation had been rather that of a "finder" of used cars rather than either dealer or salesman and it was argued in his behalf that he was thereby merely an agent of the registered dealer.

The Tribunal declined to give effect to the theory that Applicant did not require to be registered to conduct the activities complained of and that, in the public interest, to do so he must be registered.

ORDERED: Decision of Registrar denying registration as a motor vehicle salesman is confirmed.

PETER CALDERONE and
P. C. AUTO SALES

1973
TORONTO
FEB. 20

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. H.J. MORNINGSTAR, FRANK ROWLAND
MEMBERS

COUNSEL: MARTIN TEPLITSKY for Applicants
A. N. MAJAINA and M. VIRGINIA MacLEAN
for Respondent

MARCH 12TH, 1973

Proceeding by way of section 7 of The Motor Vehicle Dealers Act Applicant Peter Calderone requested a hearing by way of appeal from the Registrar's decision of December 17th, 1972 purportedly revoking his registration as a motor vehicle salesman and refusing to register P.C. Auto Sales (under which name Applicant Calderone, as sole proprietor, proposed to trade) as a motor vehicle dealer. Calderone had first been registered as a salesman in 1966 and was continuously employed as such with a series of dealers until May 1972 when his registration became subject to conditions imposed by the Registrar and consented to by him. One of the conditions so imposed and accepted was that Registrar could unilaterally suspend or cancel the registration if "any proven complaint is received (by the Registrar) in respect of the conduct of the registrant" (bracketed words added). The Registrar's position was that, since Applicant's registration as a salesman was dependent on good behaviour, it was immediately cancellable by the Registrar without reference to the Tribunal. So, in his decision of December 17th, citing alleged breaches by Applicant of The Motor Vehicle Dealers Act, the Registrar sought to recall Applicant's registration effective immediately and gave notice (in his words) "that any attempt to purchase . . . cars by Peter Calderone . . . would be unlawful and is therefore prohibited".

(cont'd)

In its decision the Tribunal commented upon the Registrar's action in purporting to recall Applicant's registration unilaterally and with immediate effect as being in excess of his powers because section 6 of the said Act which authorizes revocation is expressly subject to section 7 and hence such revocations are proposals only and can take effect only after the time allowed for appeal to the Tribunal has expired or, alternatively, on confirmation by the Tribunal following a hearing. The Tribunal doubted the proposition that Applicant's acceptance of terms attaching to his conditional registration, even including the Registrar's "right to take whatever action is necessary...", would displace the operation of section 7.

Evidence before the Tribunal indicated Applicant had, while working under a salesman registration, operated for a time a bank account under a style indicating a proprietorship. Also he had, while registered as salesman conducted numerous sales on his own account under the cover of a wholesale operator in one instance, and a repair garage in another instance, contrary to the Act. Other conduct complained of was in failing to supply a certificate of mechanical fitness to a purchaser. There was evidence that Applicant had a reputation for honesty and trustworthiness in the industry notwithstanding that he had at one time been associated with a firm convicted of fraud. There was evidence that Applicant had furnished false evidence in applications for registration.

ORDERED: Registrar's proposal to deny dealership registration is confirmed; Applicant's registration as a salesman to be suspended for 6 months and then to be granted subject to conditions including a prohibition against investment in, or assumption of any position other than salesman in, a dealership.

WILLIAM ROBERT RODDY
Applicant

1973
TORONTO
FEB. 13

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: JACIE C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS and MURRAY C. JEFFREY
MEMBERS

COUNSEL: LOUIS D. SILVER for the Applicant
ADI N. MAJAINA and MRS. DIANE STORTINI
for the Respondent

MARCH 19TH, 1973

Proceeding under section 7 of The Motor Vehicle Dealers Act, Applicant required a hearing by way of appeal from the Registrar's proposal to revoke his registration as a motor vehicle salesman for reasons fully noted in his decision dated November 21st, 1972 and supplementary reasons issued on December 20th, 1972.

Applicant had first been registered as salesman in 1965 but was suspended in 1969 for 30 days and his registration became conditional in February 1970, the terms thereof having been agreed to by him including that the Registrar need not furnish reasons for refusing a transfer from one dealership to another that Applicant might apply for. The Tribunal noted in its reasons that in so refusing to give reasons the Registrar was probably exceeding his authority notwithstanding Applicant's express acceptance. The conditional registration remained in effect until December 1972 when Registrar proposed revocation which action gave rise to these proceedings.

(cont'd)

Evidence indicated Applicant had been a principal in a series of dealerships between 1966 and 1968 and, following the restoration of his conditional registration in 1970, he became associated in turn with several dealerships and finally with Allen Auto Sales which firm became the subject of an investigation under the authority of the Director of Consumer Protection Division (now Business Practices Division) under section 25a of The Motor Vehicle Dealers Act. The circumstances giving rise to the investigation and finally to an order by the Director under section 27 controlling the assets of the Company and any trust funds held by it, were that a number of stolen cars had been purchased by the Company in the course of business and the bond of a guarantee company deposited by it with the Director, had been cancelled. With knowledge of the imminence of such "freezing order" the Company sold a number of vehicles during the three days intervening between receipt of such knowledge and the order itself. Applicant in justification said he had not understood that the order would in all certainty be made and that in disposing of part of the inventory of automobiles he was trying to satisfy pressing creditors fairly and without preference and that the resulting proceeds were deposited in the firm's general bank account and hence available to creditors generally.

Applicant admitted in evidence making false statements in sworn depositions accompanying his 1972 application for registration concerning convictions under the Criminal Code registered against him personally in connection with charges for possessing stolen goods.

Tribunal found the allegations proved that Applicant had falsely testified; that he was not carrying on as an unregistered dealer with Allen Auto Sales, as alleged, but merely as salesman with general manager's authority; that he had personally undertaken to reimburse purchasers of stolen cars although not obliged to do so; that he could be credited with informing the police when he suspected that certain cars in its inventory were indeed probably stolen; that he had complied with Registrar's notice of "revocation" upon receiving it, ceasing to carry on business as a salesman.

ORDERED: That Registrar's proposal be altered to suspend Applicant's registration for five months (two months of which has passed), such registration to remain restricted to salesman and upon conditions that he not invest in a dealership and that subsequent transfers be scrutinized by Registrar but be not unreasonably withheld.

TOWN & COUNTRY MOTORS and) I*
 DONALD A. MacDONALD)
 Applicants

1973
 CORNWALL
 APR. 10

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: HUGH F. SEDGWICK, VICE-CHAIRMAN,
 AS CHAIRMAN
 WALTER H. LIND and DON MANN,
 MEMBERS

COUNSEL: RONALD J. ADAMS, for Applicants
 A. W. ABRAMS, CHIEF INSPECTOR, MOTOR
 VEHICLE DEALERS ACT, for Registrar

APRIL 18TH, 1973

Proceeding under section 7 of The Motor Vehicle Dealers Act Applicants required a hearing in respect of the Registrar's decision dated October 26th, 1972 supplemented by his decision dated March 1st, 1973 wherein he proposed that the registrations of the Applicants as motor vehicle dealer and salesman respectively be revoked.

At the outset Applicants' counsel and the Chief Inspector indicated the parties were in accord in requesting the Tribunal to concur in having the proceedings disposed of by consent order as provided in section 4 of The Statutory Powers Procedure Act. After consideration, the Tribunal indicated its satisfaction with the procedure proposed and that it would not otherwise direct.

ORDERED: Consent order as requested with permission to Registrar to bring on a hearing on ten days notice upon the non-performance of any of their undertakings by Applicants.

*See also Town & Country Motors et al II on page 27 of this volume

VICTORIA MOTOR SALES " "
 (KITCHENER) LIMITED
 trading as
 KITCHENER BRITISH CARS
 and HARRY EDWARD DENNIS

1973
 TORONTO
 APR. 25, 26, 27

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 W. W. EVANS and PAUL WILLISON, MEMBERS

COUNSEL: D. R. HEATHER for Applicants
 R. G. MacCORMAC, REGISTRAR in person

MAY 8TH, 1973

In August 1971 the Registrar notified the Applicants of his intention to apply to the Tribunal for revocation of their registrations as motor vehicle dealer and salesman respectively pursuant to section 7 of The Used Car Dealers Act, 1968-69 whereupon Applicants gave notice that they required a hearing. The hearing date was postponed to follow proceedings involving the Applicant Dennis before a provincial judge which were eventually disposed of in January 1973.

Applicant Dennis was at all material times owner and operator of the dealership.

Applicants had first been registered in April 1965, the dealer in the style indicated first above until September 1970 when its registered trading name was changed to Kitchener British Cars. Court certificates of conviction produced showed Applicant Dennis had been convicted on three counts of false pretences involving automobile sales in 1969 and 1970 through his dealership of "new" cars which were not in fact new but had first been used in his rent-a-car business and afterwards the odometers had been spun back and the three vehicles had been otherwise "cleaned up"

(cont'd)

even to the extent of repainting, to appear as undriven cars. The three purchasers so deceived testified as to the above facts as did the mechanic who had "rolled-back" the mileages on these and at least fifteen other post-rental vehicles on instructions of Applicant Dennis.

Evidence adduced on Applicants' behalf was to the effect that Applicants had been in business for many years in Kitchener, that Applicants' two manufacturers were satisfied to continue his franchises, that the practice of turning back odometers had been a common practice in the industry in Ontario until prohibited by law in 1971. There was no evidence of "roll-backs" after such prohibition. Dennis was apparently satisfied that the prosecutions he had undergone were malicious. Character evidence indicated Applicant Dennis was well regarded in the community.

The Tribunal found Applicants had profited by their fraud, and had injured purchasers by, in effect, denying them manufacturers' new car warranties and had obtained a paint job from the manufacturer by an odometer "roll-back".

ORDERED: Registrations suspended for three months and thereafter Registrants to be subject to full and unscheduled inspections by the Registrar's inspectors for one year.

WILLIAM ELGAS WHITE'

Applicant

1973
TORONTO
MAY 15

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 HUGH F. H. SEDGWICK, H. A. KEARNEY,
 MEMBERS

COUNSEL: P. DOUGLAS GALVIN, for the Applicant
 R. G. MacCORMAC, REGISTRAR, in person

MAY 15TH, 1973

The Registrar, by letter dated December 11th, 1972, duly notified Applicant of his proposal to deny Applicant registration as salesman and of Applicant's right to require a hearing by the Tribunal by delivering a notice accordingly within 15 days thereafter as prescribed by section 7 of The Motor Vehicle Dealers Act. No such notice having been delivered, Registrar duly advised Applicant on January 5th that, in accordance with subsection 3 of said section 7, his denial of registration was therefore final. Subsequently, in response to a fresh application by Applicant under section 21, Registrar again issued a notice denying registration, from which Applicant now applies to this Tribunal pursuant to subsection 2 of said section 7.

Counsel for Applicant and Registrar advised the Tribunal that the parties were in accord in requesting the Tribunal to concur that the proceedings would be disposed of by consent order as provided in section 4 of The Statutory Powers Procedure Act. A written agreement setting forth terms acceptable to the parties was filed whereby Applicant was to cease his association with the motor vehicle industry for 3 months after which Registrar would again consider Applicant's fitness for registration having regard then for his conduct during the intervening period and, subject to this, would grant registration on terms or otherwise.

ORDERED: Consent order as requested.

MOTORCYCLES GALORE
(CALIFORNIA CUSTOM CYCLE)
and ALAN H. HARRIS

1973
TORONTO
MAY 23

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR,
ROBERT S. BANNERMAN, MEMBERS

PRESENT: ALAN H. HARRIS in person, representing
Applicants
R. G. MacCORMAC, REGISTRAR, in person

MAY 30TH, 1973

Proceeding under section 7 of The Motor Vehicle Dealers Act Applicants required a hearing by way of review of the Registrar's proposed decision revoking the registrations of Applicants as motor vehicle dealer and salesman respectively which was communicated to them by notice of April 24th, 1973 supplementing his notice of March 30th, 1973 to like effect.

Applicants had been first registered under said Act in 1971 while operating from premises in the City of Toronto. In November 1972, having transferred to a location in the Borough of North York they became in breach of the municipality's zoning by-law which excluded garages at their chosen location. Consequently two charges had been preferred against Applicant Harris, owner of the dealership, for operating without a municipal license, unobtainable in the circumstances. The Registrar, relying on section 5 (2) of said Act in conjunction with section 13 (3) of Regulations 91/71 made under said Act, took the position that premises of registrants must be approved by him and that the subject premises were clearly not approvable since the applicable municipal zoning by-law prohibited their use as a motor vehicle dealer's place of business. Applicants' position was that

provincial law had primacy and, since they were in possession of a Class A Garage License issued by the Ontario Minister of Transportation and Communications as required by The Motor Vehicle Dealers Act, they must be considered as qualified to operate from their chosen premises. On this narrow ground the Applicants, although otherwise acceptable, were to be deprived of registration.

The Tribunal upheld the Registrar holding that, to do otherwise, would place Applicants in continuous breach of the municipal by-law regulating zoning and, that in any case, The Motor Vehicle Dealers Act clearly placed such authority in the hands of the Registrar.

ORDERED: Revocation of dealer and salesman registrations.

R. 93

REGISTRAR OF MOTOR VEHICLE
DEALERS and SALESMEN1973
TORONTO
JULY 13

Applicant

and

TOWN & COUNTRY MOTORS and *
DONALD A. MacDONALD II

Respondents

TRIBUNAL: HUGH F. SEDGWICK, VICE CHAIRMAN
AS CHAIRMAN
WALTER H. LIND and DON MANN,
MEMBERSCOUNSEL: K. D. LACKNER, for Respondents
M. VIRGINIA MacLEAN, for Registrar

JULY 31ST, 1973

On the return of the Registrar's motion for a summary hearing on short notice as provided in the Tribunal's order of April 18th, 1973 made following a hearing in Cornwall on April 10th, 1973, Registrar moved the Tribunal to revoke the registrations of the Respondent registrants effective immediately.

Such order approved an agreement between the parties whereby, in return for a short term continuance of Respondents' registrations, Town & Country Motors undertook, through its principal, the Applicant MacDonald, not to increase its inventory of automobiles, to satisfy all claims of the Retail Sales Tax Department for sales tax outstanding on a certain date, to rectify the complaint of a certain dissatisfied customer, to thereafter permit examination of its books and records by the Registrar and his agents on short notice, and to wind up its business by a date certain and, on his part, the Registrar undertook to not unreasonably consider future applications of Donald A. MacDonald for renewal of registration as a motor vehicle salesman and, for the time being, to preserve confidentiality as to the hereinbefore stated undertakings of the Respondents.

(cont'd)

* See Town & Country Motors et al case on page 21 of this volume
R. 87

The Registrar satisfied the Tribunal that there had been breaches of said conditions by Respondents, namely, in failing to perform the undertaking to pay outstanding sales tax although evidence now presented indicated such breach had more recently been cured and that apparently no amount of arrears now exists. Respondents contended that the deposit of \$2000 at their credit with the Retail Sales Tax Branch together with their remaining stock of motor vehicles on hand would more than satisfy any potential liability under this head. The Registrar took the position that such breach having occurred Respondents could not be regarded as financially responsible to which Respondents replied that they should be excused by reason of certain unexpected business reverses sustained by Respondents notwithstanding which they had however eventually performed all undertakings save that of winding up the business. Respondents argued that immediate revocation would frustrate an orderly winding up of the business and subject Respondents to financial hazards unwarranted by their past conduct.

ORDERED: That registrations be continued for the period originally consented to by Registrar; that Registrar be now relieved of his undertaking not to withhold registration as salesman to Respondent MacDonald and may hereafter have due regard to all past conduct in considering any such application he may make in future.

LAWRENCE B. AUSTIN

1973

TORONTO

AUG. 14

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 MRS. HELEN MORNINGSTAR and
 MURRAY C. JEFFREY, MEMBERS

COUNSEL: GERALD GOLD for Applicant
 M. VIRGINIA MacLEAN for Respondent

AUGUST 23, 1973

Proceeding under section 7 of The Motor Vehicle Dealers Act
 Applicant required a hearing by way of review of the Registrar's
 denial of registration of Applicant as a salesman in his proposed
 decision communicated to Applicant by letter dated July 5th, 1973.

Applicant, aged 24, had first obtained registration as a salesman in 1968 which expired in October 1972 on his ceasing to be employed in the industry. Applicant had in 1971 opened a used car dealership without first applying for registration therefor required under said Act. Applicant obtained bank credit to provide capital for the dealership by a promised assignment of a stock of eleven automobiles, leases of same, book debts and collateral security. The bank, not having received the said assignments or payment of its loan, in 1972 obtained personal judgment against Applicant for \$9,882. which amount was reduced to \$5,909. by realization upon available collateral security. Applicant became bankrupt in May 1973 with an indicated indebtedness of about \$55,000. and is still undischarged. Applicant admitted, as a salesman for another dealer, having sold a car which was later discovered to have been stolen and personally undertook to reimburse the purchaser which however he failed to do. Applicant stated he had been supporting a wife and child until his recent divorce, that he was unemployed and that he had in the past earned \$25,000. a year from commissions as a motor vehicle salesman.

Tribunal found Applicant had committed breaches of the said Act, that he had defrauded the bank, and was financially irresponsible and in the public interest should not be registered.

ORDERED: Registrar's denial of registration confirmed.

WILLIAM P. HENRY, trading as
PORT CREDIT MOTORS and
WILLIAM P. HENRY

1973
TORONTO
AUG. 28, 1973

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS and THOMAS W. WOOD
MEMBERS

COUNSEL: DOUGLAS E. ROLLO, Q.C., for Applicants
A. W. ABRAMS, ACTING REGISTRAR, in person

SEPTEMBER 7TH, 1973

Proceeding under section 7 of The Motor Vehicle Dealers Act the Applicant Henry applied for a hearing by way of a review of the Registrar's decision communicated to him by letter dated July 4th, 1973 whereby the Registrar proposed to deny his applications for dealer registration and to revoke his salesman registration. At the outset Applicant abandoned his request for a hearing in respect of the dealership registration and the Tribunal proceeded to hear evidence relating only to the Registrar's revocation of salesman registration.

Reasons for its decision not having been requested by the parties, the Tribunal proceeded to render its decision as follows: Registrar to continue the Applicant's registration as salesman subject to the following special conditions, namely that -

- he shall forthwith sever his connection and forbear from any association with his present employer;
- he shall not hereafter lend money or otherwise financially assist his employing dealership in any manner inconsistent with his salesman status;
- he shall neither apply on his own behalf nor as a principal in a firm for dealer registration during the next twelve months;
- his registration is conditional upon good behaviour and due observance of the said Act.

ORDERED: Registrar to continue Applicant's salesman registration.

DON MILLS AUTO SALES and
CALVIN LEROY KIMMERLY

1973
TORONTO
OCT. 2

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN J. MORNINGSTAR,
ARTHUR D. SISLEY, MEMBERS

COUNSEL: MORRIS C. ORZECH, for Applicants
ADI N. MAJAINA, for Respondent

OCTOBER 12TH, 1973

Proceeding under section 7 of The Motor Vehicle Dealers Act Applicants required a hearing by way of review of the Registrar's proposed decision to deny the Applicant Don Mills Auto Sales registration as a motor vehicle dealer and to revoke the registration of Applicant Kimmerly as a salesman.

Kimmerly, an experienced automobile salesman, first became registered as a salesman in 1966 and shortly thereafter accepted conditions to such registration which, briefly stated, involved his undertaking to discharge, by modest installment payments, a judgment debt of \$2733. Although he failed to perform such undertaking his registration was permitted to continue based on renewed promises and for a short time he was sole proprietor of an automobile dealership which further contributed to his deteriorating financial position which resulted in personal bankruptcy following a voluntary assignment for the benefit of creditors in September 1971. He was discharged from bankruptcy at the end of 1972 and in June 1973 applied for dealership registration on the basis that he had \$10,000. on deposit in the bank and a line of bank credit of the same amount. His salesman registration not having been revoked, he had been able as early as 1970 to associate himself as an employee of a large dealership where his activities were almost entirely devoted to buying and selling used automobiles for his employer on a unit fee basis which resulted in substantial earnings to the Applicant

(cont'd)

although his remuneration was paid and received as if it were salary rather than commissions. Occasionally he bought and sold for his own account.

On these facts, the Registrar would deny his application for dealership registration alleging a lack of financial responsibility, and revoke his salesman registration because of his activity in buying and selling as though he was a principal, that is, as a dealer while not being registered as such.

The Tribunal found Applicant Kimmerly was guilty of dealing in automobiles quae dealer while not so registered and that he lacked the required degree of financial responsibility required of a successful dealer.

ORDERED: That the application for dealer registration be denied; that the salesman registration be continued on condition that Applicant not become involved financially with any dealer he works for or contravene the said Act, regulations thereunder or commit an offence under the Criminal Code or other law relevant to his fitness for registration.

DON HOWSON CHEVROLET OLDSMOBILE
LIMITED and C. DONALD HOWSON

1973
TORONTO
OCT. 10 & 11

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A., B. JANTZI, MEMBERS

COUNSEL: SIMMS SHUBER and R. DOUGHERTY
for the Applicants
CLAY M. POWELL and M.R.E. THEN
for the Respondent

OCTOBER 26TH, 1973

Proceeding pursuant to section 7 of The Motor Vehicle Dealers Act the Applicant Company, a registered motor vehicle dealer, and Applicant C. Donald Howson, a registered motor vehicle salesman, required a hearing in respect of a proposed decision of the Registrar of Motor Vehicle Dealers and Salesmen whereby the Registrar would have suspended both Applicants for ninety days. Applicant Howson was chief executive officer and the only active director of the Applicant Company which was wholly owned by him and members of his immediate family.

Inspectors from The Business Practices Division found the Applicant Company's records confirmed that the odometers of a number of vehicles in its inventory of used cars had been tampered with after which the vehicles were sold at retail by Applicant Company with reductions of the mileages indicated on the odometers. The used car sales manager, Michael Andy, admitted he had procured the services of an expert to "roll-back" the odometer readings of approximately 18 cars during 1972. In December 1972 Howson discovered the existence of this practice for the first time and became aware that the odometers of more than a dozen used cars

(cont'd)

had been "rolled-back" contrary to his express instructions issued in 1971 when the practice became illegal. When confronted by Howson regarding the "roll-backs" Andy admitted having arranged them and that his doing so was contrary to Howson's standing orders. In January 1973 Howson again circulated a written prohibition against odometer tampering coupled with a warning of immediate dismissal for anyone involved and obtained written acknowledgment of such instructions from all management personnel.

Documentary evidence was produced showing that approximately 75,000 miles in aggregate on seven specific vehicles had been turned back. The purchasers of five cars of this group testified they would either not have bought or would have offered to pay less than they did pay had they known of the "roll-backs". Another of the seven cars was sold to an unsuspecting purchaser in March 1973, three months after the roll-back revelations, and Andy testified he would not have sold this car at retail if he had known it had a spun odometer. Andy explained this lapse by the fact that the Applicant Company had "retailed" about 650 used cars in 1973 out of a total of 1400 sold.

Notwithstanding Andy's involvement in the hiring of an odometer specialist and his subsequent discovery, Howson promoted his used car sales manager in January 1973 to sales manager of new and used cars.

Howson accepted, as managing director, responsibility for the deception but excused himself by alleging it was a well-known fact that the senior executive in a large dealership such as his cannot possibly supervise all activities and must therefore rely on the middle management group. This state of affairs was also testified to by two other automobile dealers with comparable volumes and they further testified as to Howson's reputation in the trade for good character and high ethical standards and that he had worked for improvements and better standards in the industry. It was also clear that no effort had been made to "cover-up" the evidence by alteration or suppression of records.

The Tribunal found Howson was not personally aware at the time of Andy's actions in arranging for the odometer tampering but that Howson had the opportunity and ought to have more closely scrutinized his activities. The Tribunal did not accept Howson's laissez-faire philosophy of management citing the instance of one vehicle of those tampered with having been sold at retail without

adjustment knowing its odometer was incorrect. The Tribunal rejected the argument that the Applicant Company could not be held vicariously responsible in law for the malfeasances of employees for acts done without the knowledge of, and contrary to orders, of the senior executive. The Tribunal noted that the employment of 85 men and women employees were at stake in a closing down of Applicant's operations.

ORDERED: Suspension of Applicant Company's registration for 30 days; no suspension of Applicant Howson's registration as salesman.

MICHAEL ANDY

Applicant

1973

TORONTO

DEC. 18

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: HUGH F. SEDGWICK, VICE-CHAIRMAN,
AS CHAIRMAN
MRS. HELEN J. MORNINGSTAR and
DAVID A. BAKER, MEMBERS

COUNSEL: SIMMS SHUBER and R. DOUGHERTY,
for Applicant
R. G. MacCORMAC, REGISTRAR,
in person

DECEMBER 18TH, 1973

Applicant, a registered motor vehicle salesman, was the subject of a proposed order of the Registrar under section 7 of The Motor Vehicle Dealers Act to revoke his registration for reasons fully stated therein which, briefly stated, involved certain activities of the Applicant while he was used car sales manager of a registered motor vehicle dealer which had also been the subject of a proposed order revoking registration.*

Through consent of the parties an agreement between them was filed whereby the parties requested the Tribunal to dispose of these proceedings in the terms of such agreement pursuant to section 4 of The Statutory Powers Procedure Act. The Tribunal acceding to such request, considering the public interest to be protected -

ORDERED: Applicant's registration to be suspended for one year.

*(See Don Howson Chevrolet Oldsmobile Limited and C. Donald Howson case - p. 33 this Volume)

AXLER & PALMER LIMITED and
 JOSEPH L. AXLER
 Applicants
 and

1973
 TORONTO
 FEB. 5
 APR. 3 - 5
 JUNE 6, 7

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 W. W. EVANS, C.A. and ROBERT A. DOWLING,
 MEMBERS

COUNSEL: BERNARD BURTON for Applicants
 A. N. MAJAINA and MRS. DIANE STORTINI
 for Respondent

JUNE 26TH, 1973

Applicants, having notice of Registrar's proposal to revoke the broker registration of Applicant Axler & Palmer Limited and of the salesman registration of Applicant Joseph L. Axler, pursuant to section 9 of The Real Estate and Business Brokers Act, duly required a hearing by way of review of the Registrar's decision. The real estate business of Joseph L. Axler and Michael Sydney Palmer and known as "Axler & Palmer" became first registered as real estate brokers in 1956 and in 1957 became incorporated and registered as Axler & Palmer Limited. Joseph Axler has been President since inception and his partner Palmer terminated his interest and connection with the Company in 1965.

Evidence showed that in 1970 the Applicant broker paid remuneration by way of sales commissions to four salesmen who were not registered as such under the said Act, contrary to the said Act, and it was no excuse that such salesmen were employees of a partnership formation of a group of companies of which Applicant Axler & Palmer Limited was one. Applicants admitted making improper disposition of trust funds in 1969 and 1970 in violation of the said Act in that they disbursed moneys therefrom and mixed therewith funds other than trust moneys.

These transactions resulted in temporary shortages in the Axler & Palmer trust account.

Evidence showed that Applicants acting in concert with M. K. Gilmore, a salesman of Axler & Palmer Limited, successfully conspired in two instances to indirectly acquire for themselves for re-sale two properties when acting as co-selling agents representing the vendors in the sale of such properties, in both cases failing to advise the vendors of their interest, contrary to the said Act and in breach of their fiduciary capacity and to the injury of the vendors. Christie et al v. McCann (1972) 3 O.R. 125, a decision of the Ontario Court of Appeal, was relied on by the Registrar's counsel in contending that the knowledge of the salesman Gilmore as to his interest and the interest of his employer in one of the purchase transactions is to be imputed to the co-selling agent (who happened to be the listing broker) and the Tribunal adopted this proposition. Apart from this principle of agency law, section 49 of The Real Estate and Business Brokers Act prohibits an agent from purchasing directly or indirectly real estate listed with him without first disclosing such fact to the listing owner (vendor). Tribunal found the foregoing fiduciary duty and statutory prohibition had been breached and thus provided the Registrar with reasonable grounds for the belief that Applicants would not carry on business with law, integrity and honesty in accordance with said Act.

Evidence indicated Applicants had, between 1965 and 1971, submitted a number of annual applications for registration sworn to by Joseph L. Axler which were false in that negative answers were given as to the existence of unsatisfied judgments against Axler & Palmer Limited contrary to the said Act. It was not disputed that twenty-eight judgments against the two Applicants or either of them amounting to approximately \$95,476. were in the Sheriff's hands between 1965 and 1972. Moreover in 1971 and 1972 judgments of nearly \$60,000. were registered against Georgian Bay Estates, an unincorporated partnership of companies in which Applicants were substantially involved financially. This fact, together with the foregoing information concerning Applicants' financial difficulties, indicated to the Tribunal that Applicants were at the material times not financially responsible. Evidence of the current condition of the Applicants indicated that all outstanding judgments (save one still in dispute) have been satisfied and that in fact they presently enjoy a satisfactory financial position.

ORDERED: Registration of Applicant Axler & Palmer Limited as a broker and of Applicant Axler as a salesman be revoked for one year, and if and when granted, such registration be subject to periodic inspection and be revocable forthwith on any infraction of the said Act or convictions under the Criminal Code.

GRAHAM BUCKLAND

Applicant

1973
TORONTO
JULY 31

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A., MERVIN HIMES
MEMBERS

COUNSEL: N. R. H. YOUNG for Applicant
A. N. MAJAINA for Respondent

JULY 31ST, 1973

Applicant, having been denied a grant of registration under The Real Estate and Business Brokers Act as a salesman, required a hearing under section 9 of the said Act by way of review of the Registrar's decision in regard thereto communicated to Applicant by said Registrar's letter notice dated June 20th, 1973.

(Reasons for its Decision were not requested of the Tribunal.)

DECISION: Registrar to grant Applicant registration as a salesman forthwith; subject to good behaviour thereafter; Applicant shall not be granted registration as a real estate broker before January 1st, 1975.

H. JOSEPH VALEVICIUS

Applicant

1973

TORONTO

SEPT. 18

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 MRS. HELEN J. MORNINGSTAR,
 ALBERT FISH, MEMBERS

COUNSEL: APPLICANT, in person
 E. W. GELLER and A. N. MAJAINA
 for Respondent

SEPTEMBER 26TH, 1973

Proceeding under section 9 of The Real Estate and Business Brokers Act Applicant required a hearing by way of review of the Registrar's proposal to refuse him registration as a real estate broker as notified by the Registrar in his letter of June 20th, 1973 specifying the grounds for his belief that, on the basis of Applicant's past conduct, Applicant would not carry on business in accordance with law, integrity and honesty.

Applicant, in 1967, then having one year of experience as a real estate salesman, formed a brokerage firm with another salesman and the business so prospered that in the next 18 months it earned gross commissions amounting to \$600,000 from over 400 transactions and employed as many as 50 sales people. In early 1969 his partner resigned as President and severed his connections with the business in the face of its imminent collapse having then virtually no assets, and liabilities amounting to approximately \$75,000. Applicant endeavoured to carry on as its head between March and August 1969 when its affairs came under investigation under The Real Estate and Business Brokers Act. Evidence showed that, in connection with some 51 sales between March 1968 and July 1969, particulars of such were not duly recorded, trust funds received amounting to more than \$100,000 were neither recorded, deposited nor set aside, all as required by said Act, and it appeared

(cont'd)

such trust moneys before having been earned, were converted to the firm's general account and expended. Applicant was convicted before a Provincial judge following his pleas of "guilty" to four counts in proceedings under the Act in connection with the following breaches and fined \$5,000:-

- (1) in failing to keep sales record sheets in the prescribed form,
- (2) in failing to enter particulars in respect of fifty-one transactions in books and accounts,
- (3) in failing to maintain a trust account for fifty-one clients and
- (4) in failing to deposit trust funds so received in a bank, all contrary to said Act.

Applicant made an assignment in bankruptcy in 1970 and, after his discharge from bankruptcy in 1971, he again became registered as a real estate salesman.

In excusing his conduct Applicant blamed himself for trusting his partner to correctly administer the business, particularly with regard to sales records and trust funds, and realized too late that such trust was misplaced. He also admitted a lack of knowledge of the Act and Regulations but, in mitigation, asserted that no vendor or purchaser had, in fact, lost his deposit moneys. Following his assuming charge of the business in 1969 he stated he had obtained consents from all vendors except one to take deposit moneys into his commissions account on receipt.

Tribunal found much of Applicant's evidence self-serving if not untruthful and that he was irresponsible and sometimes reckless in his own testimony. Tribunal found Applicant was convicted as above stated and on a trial de novo before a County Court Judge on appeal; Applicant used trust moneys illegally for his own purposes; Applicant apparently remains unaware of the seriousness of breaches of (1) and (2) above; Applicant is irresponsible and reckless in statements made under oath; Applicant is not even today familiar with the said Act and Applicant is neither credible nor truthful.

ORDERED: Registrar's proposal to deny broker registration is confirmed.

CA 24N
CC 40
- C56

Commercial Registration Appeal Tribunal

Summaries of Decisions
Volume 3



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS - VOLUME 3

(Decisions during 1974)

These are summaries of all decisions and reasons released by the Tribunal during 1974. If reference to the full text of a decision is desired application should be made to the Tribunal's office, Toronto, Ontario

Published pursuant to The Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario 1970, Chapter 113.



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TABLE OF CASES SUMMARIZED

<u>The Collection Agencies Act</u>	<u>Page</u>
Armstrong Commercial Investigators of Canada Limited	1
<u>The Consumer Protection Act</u>	
Goetz, Renee Gisella	3
<u>The Mortgage Brokers Act</u>	
Continental Investment Co.	5
Reinhardt, Kurt	5
<u>The Motor Vehicle Dealers Act</u>	
All Cars	25
Arnold Automotive	9
Barry's Used Cars	10
Benson, Eric	33
Bilow, Roy Aaron	12
Booker, Raymond T.	28
Calderone, Peter	24
Clermont, Charles Ronald	29
Commercial Truck and Car Sales	21
Crescent Motor Sales	12
DeJonge, Henry	19
Dietz, Helmut	16
Forsyth, Robert James	31
Golden Carriage Automobiles Inc.	26
Goos, Adrianus	25
Irwin Marine & Auto Limited	39
Irwin, Robert Bruce	39

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
TABLE OF CASES SUMMARIZED

<u>The Motor Vehicle Dealers Act (cont'd)</u>	<u>Page</u>
Jessel, Bernard	7
Jussem, Arnold	9
Less-More Motors	35
MacDonald, Malcolm J.C.	21
Mars Motors	33
Marsh, John W.	35
Mazur, Stanley	14
Omega Auto Sales	14
P.C. Auto Sales	24
Pearson, John J.	26
Ramras, Harry	17
Ray's Motor Sales	28
Robinson, John Barrington	10
Smith, Donald Austin	8
Thompson, Clare	37
Thompson Motors	37
 <hr/>	
<u>The Real Estate and Business Brokers Act</u>	
Elias, Barbara	41
Vint, Raymond	41

ARMSTRONG COMMERCIAL
INVESTIGATORS OF
CANADA LIMITED

1974
TORONTO
DEC. 4

Applicant

and

REGISTRAR OF COLLECTION AGENCIES

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR and
C. GORDON BRYDEN, MEMBERS

COUNSEL: A. N. MAJAINA for Respondent
APPLICANT, in person

DECEMBER 11TH, 1974

Applicant required a hearing pursuant to section 8 of The Collection Agencies Act by way of appeal from the Registrar's order under section 30 of the Act purporting to require the alteration and amendment of certain forms of agreement used by Applicant in its collection business and to prohibit the use of such forms unless and until amended as specified in his order. Applicant having alternatively applied to the Tribunal for a stay of the Registrar's said order the proceedings were in the nature of an application for a stay in the effect of the Registrar's order and an inquiry into the merits of the appeal from such order.

Applicant's objection to the Registrar's order was to characterize it an unjust interference with the freedom of the parties to contract by agreement between them and to freely enter into resulting contractual arrangements. There was evidence Applicant had used its present (and now objected to) form of agreement for many years. However recent changes in the Ontario Regulations 21/71 made pursuant to The Collection Agencies Act required collection agencies to treat all funds when received by them, including advance payments

(cont'd)

for anticipated services to be rendered, as trust funds and hence not available to the agencies until after being earned as fees for services already performed. The Registrar's objection to the Applicant's form of customer contract was that it expressly permitted the taking of fees by the agent before its anticipated services were performed.

The Tribunal found such contract forms objectionable as harsh, false, misleading and deceptive and injurious and detrimental to the public interest. There was evidence that, in practice, the agency first deposited prepaid fees into a trust account and immediately thereafter withdrew substantially all of such fees instead of holding the entire amount of unearned fees in a rest fund until earned. The Tribunal deemed this practice to amount to the unjust enrichment of the Applicant and that such practice could conceivably result in the Applicant not having sufficient funds on hand to carry out its contractual duty to perform the collection services undertaken by it.

Applicant's argument that the parties could contract otherwise than as required by section 15(5) of the Regulations under the Act was rejected by the Tribunal holding that a customer of the Agency could not waive the statutory requirements which were intended to apply to all such contracts in the public interest and regardless of the parties' wishes to proceed otherwise. The Tribunal relied on the following authorities - Halsbury, 13th Edition, Vol. 36, p. 444, para. 673; Edward Ramia v African Woods Ltd. (1960) 1 A.E.R. 627 - a decision of the Judicial Committee of the Privy Council; the unreported decision in Don Howson Chevrolet Oldsmobile Limited v Registrar of Motor Vehicle Dealers and Salesmen - a decision of the Divisional Court, Supreme Court of Ontario dated November 22, 1974 and on Maxwell, Interpretation of Statutes, 12th Edition at p. 330. Tribunal found that Registrar's proposed amendment to vary Applicant's form of contract to be compatible with the applicable Regulation.

ORDERED: Registrar's direction to alter, vary and amend Applicant's customer contract is approved without change; the use by Applicant of the contract, unamended as aforesaid, is prohibited.

RENEE GISELLA GOETZ

Applicant

1974

TORONTO

FEB. 5

& 20

and

REGISTRAR OF CONSUMER PROTECTION BUREAU

Respondent

TRIBUNAL: H. F. H. SEDGWICK, VICE CHAIRMAN
AS CHAIRMAN
HELEN J. MORNINGSTAR and ROSS HUGHES
MEMBERS

COUNSEL: P. T. MATLOW, for the Applicant
A. N. MAJAINA, for Respondent

MARCH 18TH, 1974

Applicant's application for registration as an itinerant seller under The Consumer Protection Act was refused by the Respondent in his proposed decision with reasons based substantially on grounds that, as a director, officer and active partner with her husband in two businesses which had recently been denied registration by the Tribunal, Applicant had not shown by new and other evidence, or that the former circumstances had so materially changed, that her application should be favourably dealt with. Registrar found that, in the absence of such new circumstances, Applicant could not be expected to be financially responsible, or considered capable of carrying on business lawfully and with integrity and honesty.

At this hearing Respondent's counsel took the preliminary position that Applicant must show new or other evidence and/or such a change in the circumstances which gave rise to the Tribunal's recent decisions against Ernest Goetz Enterprises Limited and Davka Sales and Distributors Limited* in order to have the Tribunal hold a full hearing into the Respondent's denial of registration. Applicant's counsel argued that the present application was not a renewal of an earlier application but rather one made by Applicant in her own right.

(cont'd)

*for summaries of decisions See Volume 2 Summaries of Decisions pp.1 and 4

Tribunal found the application presently under review was made in Applicant's personal capacity and as such was not a renewal of the applications recently dealt with by the Tribunal and hence there should be a hearing on the merits of such application and refusal thereof.

Evidence offered by Respondent recounted several complaints against Ernest Goetz Enterprises Limited involving present Applicant including an incident involving the insertion of the name 'R. Skeries' (admitted by Applicant to be her maiden name before her marriage to Ernest Goetz) as payee of a cheque tendered by one Miss Sukulova to Ernest Goetz Enterprises Limited in payment for merchandise purchased by her at the latter's business premises. The result of this deception was virtually to render such cheque incapable of being stopped as to payment by the maker, to her detriment. Evidence accepted by the Tribunal in the decisions below referenced was referred to and showed the Applicant was, at the material time, an officer and director of Ernest Goetz Enterprises Limited and President of Davka Sales and Distributors Limited.

Applicant testified as to her innocence and non-complicity in the numerous transactions complained of and examined in the two earlier hearings. Applicant sought to explain her failure to attend at the said hearings in order to clear her name and prove her innocence of involvement in the nefarious transactions proved against her husband. Applicant also offered written testimonials as to her credit worthiness and financial worth.

Tribunal found Applicant was indeed an officer and director at all material times of Ernest Goetz Enterprises Limited and Davka Sales and Distributors Limited and must share responsibility for those companies' actions and for those matters found against them in the decisions of the Tribunal concerning them. Consequently Applicant cannot reasonably be expected to be financially responsible in her business dealings, or to carry on business lawfully and with integrity and honesty.

ORDERED: Respondent's denial of Applicant's registration sustained.

KURT REINHARDT OPERATING AS
CONTINENTAL INVESTMENT CO.

1974
TORONTO
OCT. 1 & 2

Applicant

and

REGISTRAR OF MORTGAGE BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and A. E. IRELAND,
MEMBERS

COUNSEL: H. E. KERBEL for Applicant
A. N. MAJAINA for Respondent

OCTOBER 30TH, 1974

Applicant required a hearing under section 7 of The Mortgage Brokers Act into the Registrar's proposed revocation of his registration as a mortgage broker for the reason that Registrar had concluded Applicant had by his past conduct demonstrated that he was not financially responsible in his business conduct.

Applicant had been co-partner in Continental Investment Co. which first became registered as a mortgage broker in May, 1970, such registration being cancelled one year later following the Registrar's discovery of numerous substantial personal judgments against Applicant and his business partner. The Registrar had reason to complain that a number of such judgments had not been disclosed as required in the partnership application and that the partners' explanations and promises to remove the judgments were unsatisfactory to him. Continental ceased to be a partnership in May, 1971 becoming a sole proprietorship owned by the present Applicant who thereupon applied for and obtained registration as a mortgage broker which subsisted until the present revocation now under review. In the 1972 annual return to the Registrar Applicant disclosed certain judgments against him which he disclaimed or explained as being in error and eventually evidenced good faith by posting an amount agreed to satisfy a judgment pending the outcome of his motion to set the same aside.

(cont'd)

Subsequent judgment executions amounting to approximately \$6300. have been recorded against the Applicant.

The Tribunal found Applicant had operated the mortgage business from a place other than a permanent place of business, had failed to maintain trust bank accounts and to maintain proper accounts and records, all as required by regulations under The Mortgage Brokers Act.

There was however no evidence that a member of the public had complained of, or been injured by, Applicant's business conduct and the Tribunal was disposed in all the circumstances, to overlook Applicant's nonfeasances and allow him the opportunity to carry on business provided he performs his proposed intention to vacate or otherwise lift all executions presently registered against him.

ORDERED: Registrar to grant Applicant registration provided he can within 60 days prove the absences of any judgments and executions against him, file a duly completed application for registration and has not during such period, contravened The Mortgage Brokers Act.

BERNARD JESSEL

Applicant

1974
TORONTO
JAN. 15

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
RespondentTRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H. F. H. SEDGWICK and J. HABERBUSCH,
MEMBERSCOUNSEL: APPLICANT in person
A. N. MAJAINA for Respondent

JANUARY 23RD, 1974

Applicant required a hearing by way of appeal from the Registrar's proposal to refuse to grant him registration as a motor vehicle salesman communicated to him by notice that Registrar believed on reasonable grounds that Applicant would not carry on business in accordance with law, integrity and honesty. Specifically Registrar's grounds for such belief were that: 1) Applicant in 1972 pleaded guilty to a charge of fraud contrary to the Criminal Code whereby a bank was defrauded of some \$85,000. and for which he was sentenced to one year imprisonment followed by one year probation 2) Applicant in 1972 made a voluntary assignment in bankruptcy indicating secured and unsecured claims totalling \$103,000. 3) In 1973 in a sworn application for registration as a motor vehicle salesman Applicant omitted important information concerning his activities including the fact that he had been working remuneratively in the motor vehicle industry while not registered.

The above allegations were not disputed by Applicant and in regard to 3) the Applicant admitted receiving a fee from a dealer for 'bird-dogging'. Tribunal found Applicant was an undischarged bankrupt and as such could not be expected to be financially responsible as a salesman and that his past conduct indicated reasonable grounds for the view that he would not carry on business with integrity and honesty.

ORDERED: Registrar's refusal of registration is confirmed; upon Applicant's discharge from bankruptcy and parole the Tribunal will be prepared to reconsider his position.

DONALD AUSTIN SMITH

1974

Applicant

TORONTO

JAN. 29

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN J. MORNINGSTAR,
JACK T. HOGAN, MEMBERS

COUNSEL: J. W. GOLDMAN for Applicant
M. VIRGINIA MacLEAN for Respondent

FEBRUARY 6TH, 1974

Applicant required a hearing by way of appeal from Respondent Registrar's proposal to refuse to grant him registration as a motor vehicle salesman pursuant to section 7 of The Motor Vehicle Dealers Act with detailed reasons including allegations that Applicant had recently been convicted of two offences under The Motor Vehicle Dealers Act. Registrar further alleged Applicant had in 1972 been convicted of four offences under the Criminal Code in issuing false certificates of mechanical fitness. Registrar found Applicant wanting in necessary financial responsibility, integrity and honesty.

Applicant, now 37 years old, had first obtained provisional registration as a motor vehicle dealer in 1966 which was cancelled for cause in 1968. In 1969 Applicant became registered as a motor vehicle salesman upon terms. In August 1972 he was convicted of acting as a motor vehicle dealer while not so registered contrary to The Motor Vehicle Dealers Act. In 1973 he was again convicted for the same offence, and of the four offences under the Criminal Code and of odometer tampering, all as alleged by the Registrar (above). In his application for renewal of his salesman registration in November 1973 Applicant stated that he had been unemployed for two years which was obviously false. Applicant made a voluntary assignment in bankruptcy in 1970 and was discharged from bankruptcy in 1972.

Tribunal found Applicant's past conduct afforded no reasonable grounds for concluding he would carry on business with honesty and integrity.

ORDERED: Registrar's proposal to refuse registration as salesman confirmed.

ARNOLD AUTOMOTIVE
and ARNOLD JUSSEM
Applicants

1974
TORONTO
MARCH 12

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: H. F. H. SEDGWICK, VICE CHAIRMAN
AS CHAIRMAN
W. H. LIND and G. DEAN MYERS, MEMBERS

COUNSEL: LOUIS D. SILVER, for Applicants
A. N. MAJAINA, for Respondent

MARCH 18TH, 1974

Applicants required a hearing by Tribunal in order to obtain a review of the Registrar's decision proposing revocation of the registration of Arnold Automotive as a motor vehicle dealer and of Arnold Jussem as a motor vehicle salesman on the basis that Applicant Jussem, as sole proprietor of the dealership and as salesman, in applying for such registrations had failed to disclose in sworn statements that he was at the material times actively engaged in another occupation namely that of bailiff. The Registrar now proposes the revocations because Jussem in furnishing false information as aforesaid had committed an offence under section 33 under The Motor Vehicle Dealers Act and hence had disqualified both Applicants of entitlement to registration under section 5(1)(b) of that Act.

The parties having agreed to the terms of a consent order, they proposed that these proceedings be disposed of by an order of the Tribunal under section 4 of The Statutory Powers Procedure Act approving such agreement which was to the effect that, upon the Applicant Jussem retiring from his appointment as bailiff, the registrations would be deemed to continue but subject to conditions to remain in effect until December 31, 1975. The Tribunal, not being otherwise disposed, directed that proceedings be accordingly disposed of.

ORDERED: Registrations to be continued subject to conditions as agreed between the parties.

BARRY'S USED CARS and
JOHN BARRINGTON ROBINSON

1974
LONDON
MAR. 19

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and G. E. WIELAND, MEMBERS

COUNSEL: M. A. BITZ for Applicants
M. VIRGINIA MacLEAN for Respondent

MARCH 27TH, 1974

Applicants, proceeding under section 7 of The Motor Vehicle Dealers Act, required a hearing in order to obtain a review of the Registrar's decision whereby he proposed suspension for two months of the registrations of Barry's Used Cars as a motor vehicle dealer and of Applicant Robinson as a motor vehicle salesman, the former being a sole proprietorship owned and operated by the latter. Registrar's proposal was based substantially on allegations of unsatisfactory record keeping and sale documentation, failure to notify changes of location of place of business, non-disclosure in renewal applications of convictions which, although minor, ought to have been disclosed, and for failure to deliver a bill of sale of an automobile sold by him under a conditional sale agreement.

The subject registrations had been granted conditionally in 1970 and while subject to the conditions Robinson had twice been convicted of improper use of automobile license number plates contrary to the Ontario Highway Traffic Act. Following such convictions, which undoubtedly constituted breaches of the conditions so imposed, Robinson failed to disclose such convictions in applications for renewal as required. A departmental inspection of his business records on several occasions indicated many omissions of statutorily required information including odometer readings, vehicle license and serial numbers, in-

(cont'd)

formation regarding salesmen and dealers, incomplete information in the garage register and a complete lack of reconditioning records. Moreover, having moved his place of business three times, Applicant had on each occasion failed to notify the Registrar as required. Tribunal found Applicant Robinson's excuses and explanations unsatisfactory and, although the business was a one-man operation, the Tribunal concluded he had been unnecessarily careless in business matters, in proper record keeping and in his disregard for the conditions imposed upon his registration. Tribunal further found no evidence that a member of the public had been harmed thereby.

ORDERED: Suspensions of registration shall be for one month instead of two months as proposed.

CRESCENT MOTOR SALES
and ROY AARON BILOW

1974
KINGSTON
MAR. 26

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. H. LIND and DON MANN, MEMBERS

COUNSEL: STUART W. WILLOUGHBY, Q.C., for Applicants
M. VIRGINIA MacLEAN, for Respondent

APRIL 3RD, 1974

Applicants required a hearing under section 7 of The Motor Vehicle Dealers Act respecting the Registrar's decision with reasons whereby he proposed to revoke Applicants' registrations under The Motor Vehicle Dealers Act as motor vehicle dealer and salesman respectively. The reasons furnished by Registrar for such revocations were that the present registrations of Applicant Crescent Motor Sales (wholly-owned by Bilow) and Applicant Bilow had been obtained on the basis of false sworn statements given in answers to questions concerning possible convictions for criminal offences in the latest 12 months, such statements having apparently been made by Bilow during his detention while serving prison sentences following convictions on two counts of being in possession of stolen automobiles contrary to the Criminal Code.

Evidence disclosed that Bilow had obtained conditional registration as early as 1965 while on parole while serving a seven year prison sentence received in 1961 for possession of stolen automobiles involving 17 charges. One of the conditions so imposed was that a conviction for an offence under The Used Car Dealers Act "or any other Act" would result in immediate suspension of registration.

(cont'd)

Subsequently the Registrar found Bilow had acted in admitted breach of such Act in employing an unregistered salesman. Instead of suspension, however, the Registrar administered a severe reprimand. The Tribunal did not accept such explanations as Bilow was able to give concerning the patent falsehoods in the applications, which were not immediately discovered by the Registrar.

It was argued on behalf of Applicants that there was no evidence that any member of the public had been harmed during the operations of Bilow's used car business which had been operated by his wife during his incarceration. Two motor vehicle dealers testified as to his integrity in business. The Tribunal concluded that the past conduct of the Applicant Bilow supplied ample evidence to support the belief that Applicants will not carry on business within the law and with integrity and honesty.

ORDERED: Registrar's proposal to revoke both registrations is sustained, revocations to take effect after four weeks.

OMEGA AUTO SALES and
STANLEY MAZUR

1974
TORONTO
APR. 25, 26

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and H.A. KEARNEY,
MEMBERS

COUNSEL: J. P. MOISE, for Applicants
A. N. MAJAINA for Respondent

MAY 8TH, 1974

Mazur, a registered motor vehicle salesman, as sole proprietor of Omega Auto Sales was refused registration as a motor vehicle dealer and at the same time the Registrar suspended his salesman registration for three months, all as proposed in the Registrar's decision for reasons fully set forth therein. The Applicant thereupon required a hearing into such proposed decisions pursuant to section 7 of The Motor Vehicle Dealers Act.

Applicant Mazur, 44 years of age, had been associated with an automobile dealership for more than three years, nominally as salesman, but actually as manager, buying and selling automobiles, signing cheques and sales orders of the dealership and generally supervising operations for the owner. The employing dealership's registration was revoked in January 1974 for obtaining or permitting the roll-back of odometers of some 464 vehicles and it appeared Applicant Mazur had direct knowledge of some 21 vehicles which he bought and then sold with altered mileages and admitted knowledge of as many as 50 vehicles sold by him with differences in mileage between purchase and sale dates.

(cont

Tribunal found as a fact that Applicant Mazur was actively managing the dealership prior to its de-registration, that he was presumed to have knowledge of the "roll-backs" complained of, and that he had been moreover guilty of breaches of regulations under The Motor Vehicle Dealers Act regarding due completion of purchase and sale orders. Tribunal found Applicant unfit to be proprietor of a dealership and that he would not carry on such business lawfully.

ORDERED: Registrar's denial of dealer registration sustained; Registrar's proposed three month suspension as salesman is confirmed to be renewable only on conditions.

HELMUT DIETZ

1974

TORONTO

Applicant

MAY 14

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 WALTER H. LIND and R. A. CONNOR,
 MEMBERS

COUNSEL: S. J. Av RUSKIN, for Applicant
 M. VIRGINIA MacLEAN, for Respondent

MAY 14TH, 1974

Applicant, proceeding under section 7 of The Motor Vehicle Dealers Act, required a hearing by the Tribunal by way of review of the Respondent Registrar's proposal to revoke Applicant's registration as a motor vehicle salesman by reason of complaints in connection with four transactions carried out by Applicant while a salesman with a certain dealership in which it was alleged that Applicant had, in three cases, withheld moneys received in his hands on debts due from third parties to the dealership. In another case it was alleged Applicant had attempted to discharge a debt owing by him through the credit of the dealership and that he had obtained repairs by the dealership to an automobile he had sold privately without his having acknowledged the debt thus arising.

Prior to the hearing the parties reached an agreement to the effect that the above allegations of the Registrar are accepted by Applicant at their face value; Applicant to undergo three and one-half months' suspension of registration; thereafter Applicant accepts conditions to the renewed registration, such conditions to continue for 17 months subject to good behaviour.

ORDERED: Tribunal approved agreement without change and so orders.

HARRY RAMRAS

Applicant

1974

TORONTO

MAY 28

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 WATSON W. EVANS, C.A. and
 ROBERT J. RUMBLE, MEMBERS

COUNSEL: A. N. MAJAINA and RITA A. KELLY, for Respondent
 APPLICANT, in person

JUNE 5TH, 1974

Applicant required a hearing by the Tribunal pursuant to section 7 of The Motor Vehicle Dealers Act for a review of the Registrar's decision whereby he proposed to deny Applicant registration as a motor vehicle salesman or, alternatively, to recall the provisional 60 day certificate of registration issued to him in the usual course as a first-time applicant for registration. The Registrar's refusal to grant or extend registration to Applicant was based simply on Applicant's attempt in his sworn application for registration to deceive persons dealing with the matter of his registration into concluding his comparatively recent loss of security salesman registration amounted to a mere suspension by the Ontario Securities Commission for relatively trivial and isolated causes. In fact, the Commission had cancelled Ramras' registration for commission of a series of five offences including conversion and fraud, to mention the most serious. The Registrar, as well as objecting to the calculated deception practised upon his officials, was equally concerned that such past conduct on the part of the Applicant would tend to indicate his unfitness to deal fairly with the public and, in the words of section 5(1)(b) of the Act, "would afford reasonable grounds for belief that he (would) not carry on business in accordance with law and with integrity and honesty".

(cont'd)

Tribunal found Applicant's explanations for his incorrect and inaccurate description of the circumstances surrounding the loss of his security salesman license as, at the least, unconvincing and further agreed with Registrar's conclusion concerning Applicant's unfitness to deal with the public in the field of automobile purchase.

ORDERED: Registrar's proposal to deny salesman registration was sustained.

HENRY DEJONGE

1974
 TORONTO
 MAY 22

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: H. F. H. SEDGWICK, VICE CHAIRMAN, AS CHAIRMAN
 HELEN J. MORNINGSTAR and MURRAY FELDMAN,
 MEMBERS

COUNSEL: G. B. GRAHAM for Applicant
 M. VIRGINIA MacLEAN for Respondent

JUNE 18TH, 1974

Proceeding pursuant to section 7 of The Motor Vehicle Dealers Act Applicant required a hearing by way of review of the Registrar's decision whereby he proposed to revoke Applicant's registration as a motor vehicle salesman. In his stated reasons the Registrar cited details of five transactions over a period of 18 months ending in July 1973 while Applicant was New Car Sales Manager at Northtown Ford Sales Ltd., Toronto and in each case Applicant caused to be purchased on his own account a used car offered to the dealership usually as "trade-ins" by new car purchasers. Such conduct, it was alleged, involved collusion of salesmen of his staff and, apparently to deceive both principal and customers, false and duplicate sales records, even sales tax juggling. Registrar found, in the absence of satisfactory explanations from Applicant, overtones of fraud and cheating such as to justify revocation of registration notwithstanding Applicant's complaint-free record as a salesman with one employer at least since the beginning of the provincial registration system in 1966.

The evidence, largely documentary, which was presented to the Tribunal although confirming the private dealings alleged, did not disclose a fraudulent intent but rather a desire to facilitate new car

(cont'd)

sales. The only aggrieved party, having loaned money to Applicant, met with some difficulty in obtaining repayment but Tribunal was not satisfied all evidence concerning this transaction was before it. Tribunal accepted Applicant's explanations and testimony regarding the four other transactions and, finding no evidence of fraud, concluded Registrar's proposal was unjustified.

ORDERED: Registrar's proposed revocation set aside; registration continued subject to conditions to apply for six months.

COMMERCIAL TRUCK and
CAR SALES and
MALCOLM J. C. MacDONALD

1974
TORONTO
JUNE 18
& 19

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS, C.A. AND
WILLIAM J. SHANAHAN, MEMBERS

COUNSEL: THOMAS J. LOCKWOOD for Applicants
RITA A. KELLY and A. N. MAJAINA
for Respondent

JULY 3RD, 1974

Applicants required a hearing by way of review of the Registrar's proposal under section 7 of The Motor Vehicle Dealers Act to suspend for six months Applicants' registrations as motor vehicle dealer and salesman respectively.

Applicants' present registrations had been in effect since July 1965 and from the beginning were subject to conditions imposed by the Registrar and which were in June 1972 made more onerous following a hearing under the former Used Car Dealers Act, 1964 and again in January 1973 under the present Act. The Registrar's dissatisfaction with the Applicants was due to their failure to maintain statutorily required records and trust bank account and his doubts, based on complaints received, whether the dealership was financially responsible. A number of long-standing judgments against it had remained unsatisfied and there were convictions under The Highway Traffic Act for issuing false mechanical fitness certificates. There had been specific breaches of a condition attaching to the dealership registration in the matter of filing periodic financial information and an audited statement of inventory.

(cont'd)

Other breaches of conditions were findings of guilt before a Provincial Judge of failing to file Ontario sales tax returns and of failing to maintain a record of purchases and sales of used motor vehicles as required by The Highway Traffic Act. MacDonald had moreover sworn falsely in his dealership registration application form when applying for renewal in 1973 by failing to disclose convictions in the past twelve months.

The above allegations were substantially proved. Statements prepared by a public accountant as of February 28, 1973, and as of May 31, 1974 purporting to reflect the financial condition of the applicant dealership were introduced but they were not sufficiently detailed or certified so as to meet the conditions imposed by the Registrar. The only other evidence as to the current financial condition of the dealership was in the testimony of the proprietor MacDonald at the hearing and a bank letter which were deemed inconclusive. It was not seriously disputed that MacDonald had been carrying on business in names other than that of the dealer-registrant contrary to The Motor Vehicle Dealers Act, and that he had failed to supply odometer mileage and vehicle serial numbers in sale contracts as required by such Act. There were moreover instances of failure in supplying certificates of mechanical fitness to purchasers of used motor vehicles as required by The Highway Traffic Act. Evidence was presented of three cases of customer dissatisfaction where justified complaints were not promptly taken care of and, in a fourth case, where the customer was deceived as to the model year in the purchase of a used truck. In sum, Applicant, as proprietor, was at times careless, even irresponsible.

The type of business carried on by Applicant was unusual — indeed, almost unique — in providing a market for buying and selling used trucks of special body design. Written testimonials of numerous satisfied customers indicated the business provided a useful service to a wide clientele. The Tribunal concluded from such evidence that Applicant supplied a need and, because customer complaints seemed few in relation to the extent of the business, the Tribunal thought it appropriate to reduce the proposed suspensions to three months definite and for such longer period as may be required in order that the dealer perform the following:

- 1) produce to the Registrar audited financial statements of the dealership including an inventory certified by a person or firm licensed under The Public Accountancy Act
- 2) satisfy all present judgments against the dealership

(cont'd)

- 3) refund a certain customer the amount of sales tax improperly collected from him
- 4) responsibly repair a certain customer's truck engine
- 5) adopt approved forms of sales contract

ORDERED: Three month suspension of dealer and salesman registration renewable on completion of above conditions precedent and on conditions.

PETER CALDERONE* and
P. C. AUTO SALES II

1974
TORONTO
JULY 16

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. H. J. MORNINGSTAR and FRANK ROWLAND
MEMBERS

COUNSEL: MARTIN TEPLITSKY for Applicants
R. G. MacCORMAC, REGISTRAR, in person

JULY 17TH, 1974

The Tribunal's decision of March 12, 1973 confirmed the Registrar's proposed denial of registration of P. C. Auto Sales as a motor vehicle dealer and directed a five month suspension rather than revocation as proposed, of Calderone's registration as a motor vehicle salesman. The decision was appealed by Applicants to the Divisional Court, Supreme Court of Ontario and, by judgment dated 19th June 1974, the Court ordered that the issue of an appropriate penalty to be imposed on Calderone be referred back to the Tribunal with directions to the Tribunal as to certain of its findings it should, and others it should not, have regard to in imposing its penalty.

Upon the matter coming again before the Tribunal and after hearing argument of counsel for Applicants and from the Registrar, the Tribunal ordered suspension of Calderone as a motor vehicle salesman for one month and that, following such suspension, Calderone's registration would remain under conditions restricting his employment as such with approved motor vehicle dealers and he was prohibited from investing in or assuming any position other than salesman with such approved dealer. The approval referred to was to be that of the Registrar and was not to be unreasonably withheld.

ORDERED: As above.

* See Peter Calderone and P.C. Auto Sales case
at p. 17 Volume 2 Summaries of Decisions

ALL CARS and
ADRIANUS GOOS

1974
TORONTO
AUG. 13

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. H. LIND and J. T. DAVIDSON, MEMBERS

COUNSEL: H. D. BRYANT for Applicant
R. G. MacCORMAC, REGISTRAR, in person

AUGUST 13TH, 1974

Proceeding under section 7 of The Motor Vehicle Dealers Act, Applicant Goos, operating a motor vehicle dealership under the name of All Cars as proprietor and as salesman therefor, duly required a hearing into the Registrar's proposal to refuse registration to the Applicants as dealer and salesman respectively, such proposal having been communicated to Applicants with fully stated reasons.

At the outset the Registrar and Applicants' counsel advised the Tribunal that agreement had been reached between them and requested that the matter be disposed of pursuant to section 4 of The Statutory Powers Procedure Act, 1971 and produced a written agreement setting forth the proposed terms of a consent order to be made by the Tribunal. The Tribunal agreeing to make no other direction it was ordered accordingly.

ORDERED: Applicant be granted dealer and salesman registrations two months hence on conditions applicable for fourteen months thereafter.

GOLDEN CARRIAGE
AUTOMOBILES INC.
and JOHN J. PEARSON

1974
LONDON
JULY 31
AUG. 1

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. H. LIND and WM. J. GUIGNON, MEMBERS

COUNSEL: M. VIRGINIA MacLEAN for Respondent

AUGUST 30TH, 1974

Applicants required a hearing into the Registrar's proposed revocation of registration of Golden Carriage Automobiles Inc. as a motor vehicle dealer and of John J. Pearson as a motor vehicle salesman made in writing with reasons. Applicant Pearson, President of the incorporated dealer, did not attend the hearing and neither Applicant was represented thereat although both received due and timely notice and were afforded sufficient opportunity to inform themselves as to the file of documentary evidence the Registrar proposed to present at the hearing. Applicant Pearson had endeavoured through a ruse to obtain a last-minute postponement by pretending to be telephoning from Florida when, in fact, he was presumably telephoning from a point in or near London, Ontario.

The incorporated Applicant had been first registered as a dealer in April 1973 upon conditions agreed to by it in writing that such conditions were to apply until the end of 1974 including among others the requirement that it deposit \$5000. in a bank for the benefit of the Crown and available for stated purposes for a period of six months or until Applicants' net worth could be demonstrated to be suitably substantial through audited financial statements to be furnished by the Applicant. The Tribunal found Applicants had breached at least two of the conditions in that Applicant Pearson had been con-

(cont'd)

victed under The Ontario Highway Traffic Act of issuing a false mechanical fitness certificate and of permitting a license plate to be mounted on a vehicle for which no plate had been issued. It was also proved that the Applicant dealer had failed to maintain deposits in a trust account as required and that it had issued worthless cheques to satisfy a bailiff's seizure under a tax warrant for business taxes. There was ample evidence of Applicants' practice in issuing worthless cheques, of numerous outstanding charges laid against them for issuing false certificates of mechanical fitness, of a number of unsatisfactory retail transactions, and of the failure to remit Ontario Retail Sales Tax. Moreover the fidelity bond of \$3000. posted with the Registrar had been cancelled by the issuer. Finally there was evidence Applicants were in arrears in wage payments to employees.

Based on the foregoing conduct of Applicants, Tribunal found them unfit to be registered as not financially responsible and that they would not carry on business with integrity and honesty or within the law.

ORDERED: Registrar's proposed revocation of registrations confirmed, effective immediately; the bank deposit of \$5000. above referred to will be forfeited to the Crown.

RAY'S MOTOR SALES and
RAYMOND T. BOOKER

1974
TORONTO
SEPT. 11

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR and
THOMAS W. WOOD, MEMBERS

COUNSEL: WILLIAM J. HUBER, for Applicant
R. G. MacCORMAC, REGISTRAR, in person

SEPTEMBER 11TH, 1974

Proceeding under section 7 of The Motor Vehicle Dealers Act
Applicant Ray's Motor Sales, a registered motor vehicle dealer, and
Applicant Raymond T. Booker, a registered motor vehicle salesman,
required a hearing into the Registrar's proposal to revoke the respective
registrations duly communicated to them with reasons very fully
set forth.

At the outset the Registrar and Applicants' counsel advised the Tribunal that they had agreed that the matter should be disposed of pursuant to section 4(c)(ii), of The Statutory Powers Procedure Act, 1971, that is to say, by decision of the Tribunal without reasons being given, the parties waiving the hearing or usual compliance with such Act. The Tribunal agreed to make no other direction.

ORDERED: Applicant Dealer's registration shall be revoked effective within 15 days hereafter; Applicant Salesman's registration is suspended for one year.

CHARLES RONALD CLERMONT

1974

Applicant

OTTAWA

AUG. 27

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. H. LIND and D. A. BAKER, MEMBERS

COUNSEL: R. D. ALLARD for Applicant
M. VIRGINIA MacLEAN for Respondent

SEPTEMBER 16TH, 1974

Applicant required a hearing into the Registrar's proposed refusal to register him as a motor vehicle salesman for reasons stated in the Registrar's proposal which, briefly stated, were that Applicant's past conduct as a registered real estate salesman, which had resulted in the revocation of his registration, was such as to afford reasonable grounds to the Registrar in refusing him registered status as a motor vehicle salesman because he could not be expected to carry on business lawfully or with integrity and honesty.

Applicant, aged 43, had been a security salesman for ten years before applying for registration as a real estate salesman which he was granted in September 1973 after successfully passing a mandatory examination based on a 90 hour course of lectures on the subject of real estate with particular reference to The Real Estate and Business Brokers Act and regulations and practice thereunder. During the succeeding five months his experience in real estate selling consisted of receiving "in-house" instruction from his employer and two sales transactions carried out under the supervision of his employer's branch manager. In February 1974 Applicant, having learned of the interest of a client in purchasing an unlisted commercial property, induced it to sign an offer to purchase such property hoping, no doubt, to obtain the listing and an acceptance of such offer from the owner.

(cont'd)

The offer, which was made out by the Applicant provided for a deposit sum of \$5000. which was made payable to Applicant personally and was by its terms open for 30 days. In the result such offer was not accepted nor was Applicant successful in obtaining the hoped for listing but Applicant held the proceeds of the deposit in his own bank account during the term of the offer instead of making it over to his employing broker as required by law. Although the full amount of the deposit was eventually returned to the client there was some delay in doing so and for this indiscretion the Registrar of Real Estate Brokers revoked Applicant's registration. On the ground of such revocation and the circumstances surrounding same, the Registrar of Motor Vehicle Dealers and Salesmen refused registration to Applicant as a salesman.

While not disputing the foregoing facts Applicant explained his conduct as an error due to inexperience and because, during his long experience as a bond salesman, he had been accustomed to handling security purchase moneys in his own account. The Tribunal rejected the latter explanation but was inclined to accept the former and, in view of the impressive written and oral testimonials vouching for Applicant's honesty, was prepared to excuse Applicant's conduct and direct that registration as a motor vehicle salesman be granted. Tribunal also took account of the fact that Applicant had already received punishment in being denied further employment in the real estate field.

ORDERED: Applicant to be registered as salesman upon conditions.

ROBERT JAMES FORSYTH
Applicant

1974
TORONTO
SEPT. 19

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and K. J. HALNAN, MEMBERS

COUNSEL: A. N. MAJAINA for Respondent
APPLICANT in person

SEPTEMBER 30TH, 1974

Applicant Forsyth, 44 years of age with 18 years of experience in motor vehicle sales, having been refused registration as a motor vehicle salesman by the Registrar in a written proposal, with stated reasons, requested a hearing pursuant to section 7 of The Motor Vehicle Dealers Act. The Registrar in such proposal cited the personal bankruptcy of the Applicant wherein it appeared there was a deficiency of some \$67,000. in the assets of Applicant and his wife when they filed a joint assignment for the benefit of creditors in June, 1974 in connection with the car dealership formerly carried on by them in partnership. The Registrar also referred to the sale in September, 1973 by the Applicant through such dealership of a used automobile to a purchaser for value without notice to the purchaser of a lien outstanding against the vehicle then amounting to approximately \$2000. On these grounds the Registrar found Applicant to be wanting in financial responsibility in the conduct of business and accordingly refused him registration as salesman.

The uncontradicted evidence showed Applicant had unwisely consented to assume the direction of an incorporated motor vehicle leasing business which he then operated in conjunction with the dealership operated by him and his wife and to personally guarantee jointly and severally with a silent partner the considerable bank loans required by such business for working capital. It soon became apparent that the financial

(cont'd)

position of the leasing business was worse than had been first supposed due to previous mismanagement and, when his outside business partner later refused to continue his considerable financial support, Applicant terminated his connection with the leasing company. In the process the dealership business owned by Applicant and his wife, collapsed due to its dependence on the sale of used lease cars of the leasing company and bankruptcy ensued.

Regarding the used car transaction referred to above Applicant's explanation was that he had transferred the cash proceeds of sale when received by his dealership to the leasing business expecting it to pay out the amount of the lien therefrom. Instead the proceeds were applied by the bank in reduction of the company's overdraft. The Tribunal did not wholly accept this explanation of the matter, since Applicant was an officer and manager of the leasing company when the lien was created and when the sale complained of was carried out. Tribunal further found Applicant could not be considered financially responsible for so long as he was an undischarged bankrupt.

ORDERED: Registration refusal confirmed with direction to Registrar to deal favourably with any fresh application following Applicant's discharge from bankruptcy such registration to remain subject to conditions for one year and to subsist only during good behaviour.

MARS MOTORS and
ERIC BENSON

Applicants

1974
HAMILTON
OCT. 16, 17

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and MURRAY FELDMAN,
MEMBERS

COUNSEL: M. VIRGINIA MacLEAN for Respondent
APPLICANTS, in person

NOVEMBER 7TH, 1974

The Registrar by written decision with stated reasons proposed to revoke the dealer registration of Mars Motors and salesman registration of Eric Benson, the dealership proprietor, from which proposal Applicants required a hearing under section 7 of The Motor Vehicle Dealers Act.

Applicant Benson had been a registered salesman since 1965 and registered as a dealer, at first under his own name for more than two years and, latterly, for a further two years under the present dealer name. The Applicant dealership had been the subject of an order made in March 1974 under section 25 of The Motor Vehicle Dealers Act by the Director of Business Practices Division, Ministry of Consumer and Commercial Relations, appointing and directing inspectors to conduct an investigation into its affairs in order to determine whether there had been breaches of the Act and/or regulations thereunder. The inspectors attended the dealership premises on two occasions to inspect its records. On the first occasion the Applicant Benson denied them an opportunity to carry out a limited inspection and later offered them an opportunity to examine those documents which they might specify. Benson's obstruction in the face of the Director's order effectively prevented the inspectors' intended inves-

(cont'd)

tigation into allegations that a number of unregistered salesmen were employed contrary to the Act, that trust accounts and records thereof were not being maintained, contrary to regulations, that purchase orders were not being properly completed as required by the regulations and finally that odometer tampering was being practised or permitted, contrary to the regulations.

The Tribunal found that at least six persons had at various material times been permitted to carry out the functions of salesmen while not registered as such. Tribunal further found as a fact that routine as prescribed by applicable regulations was not followed in the matter of making and keeping records and that a bank trust account had only been opened for the first time in May 1974. The testimony of a number of disgruntled purchasers of used cars, which was not challenged, indicated that a number of mechanically unfit automobiles were sold as fit for the road, that sales were made on and off the premises of vehicles that were not the property of the Applicant Dealer at the time of sale, that transfer documents were frequently not delivered at the time of sale and when delivered were found to have been "signed" by persons on behalf of the dealer with no apparent authority to do so. Tribunal further found as a matter of evidence that certificates of mechanical fitness were sometimes casually made out without any inspection of the vehicles having been carried out. The Tribunal further found Applicant dealer had failed to notify the Registrar of the termination of an employee's employment as required.

Evidence was offered on Applicants' behalf by a new and a used car dealer of repute who testified that they had had a number of satisfactory dealings with Applicant Benson and his dealership.

ORDERED: That Applicant dealer and salesman registrations be suspended for eight months; any renewal of registration to be upon conditions for a period of 17 months.

LESS-MORE MOTORS
and JOHN W. MARSH

Applicants

1974
LONDON
OCT. 24
& 25

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H. F. H. SEDGWICK and JACK B. FORBES
MEMBERS

COUNSEL: A. GRANT EVANS for Applicant
M. VIRGINIA MacLEAN for Respondent

NOVEMBER 13TH, 1974

Applicant Marsh, operator of a small used car business he called Less-More Motors, required a hearing by the Tribunal into the Registrar's proposed revocation of the dealer and salesman registrations duly communicated to the Applicants by written proposal with reasons on September 9th, 1974 following a meeting of both parties a few days earlier. Between the fixing of a date for the hearing and this hearing Applicant Marsh advised the Registrar of his intention to surrender his dealership registration and at the opening of the hearing it was agreed by counsel that the single matter under review was the Registrar's proposal to revoke Applicant's registration as a salesman of motor vehicles.

Marsh, 54 years of age, had first been registered as a motor vehicle salesman for a short period in 1968 and again for a few months in 1969. Having in the interim been otherwise employed and unemployed, Applicant again applied and obtained registration in August 1973 as dealer and salesman which subsisted until the former was surrendered as above stated and the latter is now proposed to be revoked. The applications for these various registrations, although affirmed by sworn affidavit of the Applicant, contained a number of

(cont'd)

untruths regarding past employment and failed to disclose as required two criminal convictions and the suspension of his driving license. Uncontroverted evidence at the hearing showed Applicant had been engaged in buying and selling cars for an unregistered dealer at a time when Applicant himself held no registration. There was evidence Applicant had been convicted of possession of stolen property knowing it to be stolen and of damage to property. Applicant had sold a used Cadillac to a dealer who, after re-selling it immediately, learned for the first time of the existence of a chattel mortgage partly secured by the Cadillac which Applicant had given to a bank. Applicant, not having received payment from the dealer, took it upon himself to illegally repossess the Cadillac without notice to the innocent purchaser. Applicant, while unregistered, had 'purchased' five used cars purportedly for a dealer proffering payment by means of a cheque which was later returned "N.S.F.". Applicant's own evidence as to the foregoing and as to other irregularities failed to explain his conduct or were patently false explanations. Applicant admitted that his bank had repossessed and sold the dealership inventory of cars for part satisfaction of his debt to the bank and that he was at the time of the hearing in debt to the extent of at least \$6000.

Tribunal found Applicant to be unreliable in his testimony and that the Registrar's allegations above stated to be justified and consequently that he was lacking in the required degree of financial responsibility and that his past conduct indicated he could not be expected to carry on business with integrity and honesty.

ORDERED: Registrar's proposal to revoke salesman registration sustained.

THOMPSON MOTORS and
CLARE THOMPSON

1974
TORONTO
OCT. 29

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and PAUL WILLISON,
MEMBERS

COUNSEL: GEORGE WOOTTEN, Q.C. for Applicants
R. G. MacCORMAC, REGISTRAR in person

NOVEMBER 13TH, 1974

Applicant Thompson, proprietor and operator of an automobile repair garage and service station (Thompson Motors) in a village of 600 having been refused registration as a motor vehicle dealer and salesman respectively by the Registrar required a hearing into the decision of the Registrar with full written reasons.

Applicant Thompson, 47 years of age, had been engaged in the automobile repair and service station business for 24 years when in 1971, his registrations as a used car dealer and salesman were revoked for a lack of financial responsibility as evidenced by his personal bankruptcy and for other breaches of the former Used Car Dealers Act. Upon his discharge from bankruptcy in October 1972 he again commenced business as a used car dealer under the present style of Thompson Motors in the same community of 600 in which he had lived and worked as above stated since 1947 and supplemented his income by driving a school bus and caring for a disabled person. Statements prepared by public accountants between August 1973 and September 1974 indicated a continuing improvement in his financial affairs and indicated a net worth in his business in excess of \$34,000. and a bank credit line of \$10,000. Responsible citizens of his community testi-

(cont'd)

fied to the effect that Thompson enjoyed a good reputation. Such testimonials and indications of financial improvement in his affairs were accepted by the Tribunal as evidencing a sufficient financial responsibility in his business conduct to merit registration on condition that he provide additional security for the public's protection.

ORDERED: Registrar to grant dealer and salesman registrations on condition that dealership provides security of \$5000. (in addition to statutory bond) liable to forfeiture on bankruptcy or conviction of an offence affecting such registrations.

IRWIN MARINE AND AUTO
LIMITED AND
ROBERT BRUCE IRWIN

1974
TORONTO
OCT. 8

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR and
DEAN MYERS, MEMBERS

COUNSEL: D. H. LISSAMAN, Q.C. for Applicants
A. N. MAJAINA for Respondent

DECEMBER 11TH, 1974

Applicants required a review of Registrar's denial of their applications for motor vehicle dealer and salesman registrations as communicated to them in his proposal based chiefly on a lack of satisfactory financial information of the affairs of the company which the Registrar had reasonably requested in view of Applicant Irwin's past involvement in a predecessor incorporated registered dealership which had made an assignment in bankruptcy in January 1970. Shortly thereafter the present Applicants had in September 1970 applied for, and been refused, the desired registrations under the former Used Car Dealers Act and such denial was duly reviewed and confirmed by the Director of Registration and Examination Branch of the former Department of Financial and Commercial Affairs in accordance with procedures specified by the said Act. In his decision the Director had encouraged Applicants to re-apply for registration after an interval in case there had been a significant improvement in their financial circumstances. Accordingly, Applicant Irwin, 33, as sole owner of the capital shares of the Applicant Irwin Marine and Auto Limited, caused applications to be made on Applicants' behalf, first in 1971 and, following issuance of the Director's written decision in 1972,

(cont'd)

again in 1974. The Registrar's insistence on production of certified financial statements to support such renewed applications, which Applicants declined or refrained from producing, gave rise to the present proceedings. The main issue therefore to which the Tribunal addressed itself was the present financial situation of the Applicants.

Evidence by a certified public accountant following his consideration of an unaudited, uncertified financial report for the fiscal year of the Company ending September 30, 1973 indicated Irwin Marine's profitability was extremely low and it was his opinion that it appeared at least doubtful that it was solvent. He stated his diffidence in offering any opinion as to the future progress of the Company without certified financial statements for the previous three years of operation. On the other hand Tribunal accepted evidence given on Applicants' behalf that Irwin Marine presently had an inventory valued at \$150,000., that it was meeting its debts satisfactorily within a period of 30 days, that it had an assured bank line of credit amounting to \$50,000. secured by Applicant Irwin's personal assets which he valued at \$476,000. chiefly real estate.

Based on the foregoing, Tribunal found that Applicants could be expected to be financially responsible and would direct the granting of the registrations sought provided Applicants supported their claims as to net worth and profitability by supplying audited financial statements as at September 30, 1974 by a certified public accountant and deposit of a bond, or cash or security in the amount of \$25,000. to and in favour of the Crown in addition to the usual guarantee required under The Motor Vehicle Dealers Act.

ORDERED: Registrations to be granted subject to the security aforesaid and upon conditions.

RAYMOND VINT
and
BARBARA ELIAS

1974
TORONTO
MAY 7

Applicants

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS, C.A. and
SADIE MORANIS, F.R.I., MEMBERS

COUNSEL: IVAN FLEISHMAN, for Applicants
A. N. MAJAINA, for Respondent

MAY 8TH, 1974

Proceeding under section 9 of The Real Estate and Business Brokers Act Applicants required a hearing in order to obtain a review by the Tribunal of the Registrar's decision whereby he proposed one month's suspension of the registration of each Applicant as real estate salesman alleging their lack of financial responsibility, past conduct suggesting they would not carry on business honestly and within the law and that some of their past activities contravened, or would contravene, the said Act and regulations. The conduct complained of involved a series of purchases for purposes of resale by one or both of Applicants, but usually in the name of other persons or entities, and without disclosure to the vendors of Applicants' interests contrary to section 42 of the Act. The Registrar also alleged that such transactions were carried out in breach of Applicants' fiduciary duties to such vendors and resulted in their unjust enrichment through such secret profits. Registrar further alleged that such conduct amounted to a breach of section 3 of the Act in that Applicants had, in fact, dealt in real estate as brokers while not so registered. Registrar noted in his decision that Applicants had already made restitution to some, and were continuing to negotiate with others, of the innocent vendors with a view to making compensation for the

(cont'd)

profits they were thus deprived of.

The parties to the hearing referred to an agreement between them and requested the Tribunal to dispose of the matter by consent order providing for a penalty of one month's suspension of each Applicant and thereafter that Applicants' registrations would be subject to stringent conditions during a probationary period of one year. It was admitted by Registrar that during his investigations Applicants had co-operated fully, that the assets of Applicants had been frozen and lis pendens registered against their lands pursuant to section 29 of the Act, that restitution already made by Applicants to vendors amounted to \$50,418. and that each had pleaded guilty to a charge and paid a fine of \$3,500.

ORDERED: Tribunal approved the agreement with added proviso that Applicants were to satisfy all reasonable claims of which they will have notice by June 30, 1974 and thereafter cautions or lis pendens to be lifted; one month's suspension of registrations ordered, followed by ten months' probationary registration subject to numerous conditions, a breach of any of which shall result in immediate revocation of registration.

2A20N
CC40
- C56

GOVT PUBLNS

Commercial Registration Appeal Tribunal

Summaries of Decisions
Volume 4



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS - VOLUME 4

(Decisions during 1975)

These are summaries of all decisions and reasons given following hearings in 1975. If reference to the full text of a decision is desired application should be made to the Tribunal's Office, Toronto, Ontario.

Published pursuant to The Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario 1970, Chapter 113.



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TABLE OF CASES SUMMARIZED

<u>The Motor Vehicle Dealers Act</u>	<u>Page</u>
Bilow, Ruth	14
Cermak, Vladimir	1
Fraser, Bruce D.	3
Hynes, Calvert H.	4
Jack Mandos Car Sales & Service Ltd.	6
L & S Motors	8
Lamanes, Chas. W.	8
Perala, Kalevi	10
Roddy, Wm. R.	12
Roy's Auto Wreckers	14
Sabourin, John C.	16
Van Vilsteren, Arnold J.	18
Whitney Car Sales	20
Whittey, Walter	20
<u>The Real Estate and Business Brokers</u>	
Arnold, Allen F.	23
Banks, Lorne	33
Bosco, Joseph	29
Dassinger, George	27
Joseph Bosco Real Estate Limited	29
Lorne Banks Real Estate Limited	33
Payette, Larry	35
Wilson, Raymond P.	23
<u>The Travel Industry Act, 1974</u>	
Commonwealth Economy Tours Limited	39

TORONTO

1975

JULY 3, 4

VLADIMIR CERMAK

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and Wm. J. SHANAHAN,
MEMBERS

COUNSEL: ARTHUR MACCOLL for Applicant
VIRGINIA MACLEAN for Respondent

JULY 22, 1975

Applicant required a hearing by way of appeal from the Respondent Registrar's decision to refuse to grant his request for registration as a motor vehicle salesman, all pursuant to Section 7 of the Motor Vehicle Dealers Act. The Registrar's ground for such refusal was that, based on allegations of misconduct fully stated in his proposal, Applicant could not reasonably be expected to carry on business in accordance with law and with integrity and honesty as provided in Section 5 (1) (b) of such Act. The conduct complained of was that, following dissolution in December 1974 of the partnership between Applicant and one Pelc in a registered dealership after merely seven months of operation, Applicant had unlawfully carried on business together with a new partner as motor vehicle dealers when neither was registered under the Act and had more recently carried on the business of motor vehicle salesman in a dealer's employ while not registered as such. The Registrar further alleged Applicant had induced, or conspired with, an unlicensed salesman to conduct private sales of automobiles of such illegal dealership or of automobiles purchased by Applicant for re-sale, (illegal in that meanwhile he was not registered as dealer) through the ruse of advertising private owner sales away from the premises of the dealership or sales lot, contrary to the Act.

(cont'd)

Tribunal found on the evidence presented at the hearing that the above allegations were proved and also that Applicant had sworn falsely in the application under consideration in that he had, in fact, been engaged for three months in 1975 in the business of car salesman without registration notwithstanding his claim to be unemployed during such period. Tribunal further found that the so-called "private" sales described above resulted in delivery of mechanically unfit, if not dangerous, vehicles to unsuspecting purchasers induced to purchase such vehicles by false certificates of mechanical fitness relative thereto. Applicant had moreover breached his undertaking not to engage in selling automobiles pending registration as salesman.

ORDERED: Registrar's refusal to grant registration as salesman is confirmed.

1975

BRUCE DAVID FRASER
Applicant

BELLEVIL
OCT. 1

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS and
BRIAN CONDIE, MEMBERS

COUNSEL: H. ROBERT SHEPPARD for Applicant
A. N. MAJAINA for Respondent

OCTOBER 14TH, 1975

Applicant, having been notified by the Registrar (Respondent) of his refusal to register him as a motor vehicle salesman under The Motor Vehicle Dealers Act, duly proceeded pursuant to section 7 of said Act to require a hearing by the Tribunal. In his proposed decision the Registrar very fully set forth his reasons for such refusal which, briefly stated, were that Applicant had seriously misrepresented his past employment and business status in his application for registration personally completed and sworn to by the Applicant and that he had sought to deceive the Registrar by untruthfully concealing his conviction in 1972 on fourteen counts of theft by conversion of funds and two counts of uttering or using forged cheques.

According to the uncontroverted evidence received by the Tribunal Applicant had in 1972 received concurrent suspended sentences and probation upon his convictions on the above charges and had failed to disclose such information as required in his sworn application for salesman registration, and had also concealed the charges which gave rise to such convictions in his sworn application made in 1971 for a licence as a life insurance salesman. Evidence was given by his district manager of the life insurance society sponsoring him until he was dismissed thereby in 1974 for misappropriation of the society's funds to his own use, of his misconduct in this regard and of his failure to repay such funds. The Tribunal found Applicant lacked the degree of honesty and responsibility required of a salesman.

ORDERED: The Registrar's refusal is confirmed; registration denied.

1975

CALVERT H. HYNES
ApplicantHAMILTON
SEPT. 4

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
RespondentTRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS and THOS. W. WOOD,
MEMBERSCOUNSEL: M. VIRGINIA MACLEAN for Respondent
APPLICANT - in person

SEPTEMBER 12TH, 1975

Applicant, a registered motor vehicle salesman, proceeding under section 7 of The Motor Vehicle Dealers Act, required a hearing by the Tribunal to review the proposed decision of the Registrar (Respondent) wherein he would suspend Applicant's registration for one month and thereafter impose conditions. The Registrar's decision fully set forth his reasons for the proposed suspension citing Applicant's conduct toward an innocent would-be purchaser of a new car in failing to account to both the purchaser and Applicant's employing dealer for sums of money paid to him in good faith by the purchaser as intended down payments on a new automobile. Applicant frustrated the purchase by failing to complete or present any executory contract to his dealer to the injury of the dealership which, on learning of the matter, reimbursed its would-customer whose patience, becoming exhausted, purchased the desired automobile elsewhere. The Registrar would have proposed a longer suspension or an even more severe penalty but for Applicant's previous good record and his long military service and because he had six dependants.

The Tribunal found, on the evidence, that the Applicant was 44 years old, had six dependants, had been discharged from the Canadian Armed Services while holding the rank of Warrant Officer and had first become registered as a salesman of motor vehicles in 1973, thereafter transferring dealer affiliation twice including a period of seven months with the dealer above referred to. Evidence substantially verifying the conduct complained of by the Registrar as outlined above was proved to the Tribunal's satisfaction. The Applicant offered in excuse of his conduct that he was at the time financially embarrassed and desperately required moneys to support

(cont'd)

his family because his service pension and earnings were insufficient. Applicant testified to his improved earnings at the time of the hearing although he owed about \$3,000. to his credit union. Moreover Applicant had so far failed to make good the moneys put up by his former employer on his behalf.

ORDERED: Tribunal sustains Registrar's proposed suspension of one month followed by re-instatement upon same conditions.

MAR. 2

JACK MANDOS CAR SALES & SERVICE LTD.

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR and
R. S. BANNERMAN, MEMBERS

COUNSEL: DOUGLAS E. ROLLO, Q.C., for Applicant
VIRGINIA MACLEAN for Respondent

APRIL 9TH, 1975

Applicant, a registered motor vehicle dealer operating from premises in Scarborough, in June 1974 made application to the Respondent Registrar pursuant to section 13 of Ontario Regulation 98/71 made under the Motor Vehicle Dealers Act for approval to operate from an additional branch location. Discussions followed over several months between officials from the Registrar's office and Jack Mandos, a registered motor vehicle salesman, as proprietor and operator of the applicant dealership, regarding the suitability of the proposed branch premises located in Toronto several miles distant from the principal dealership. Finally when it appeared to the Registrar that business was being conducted by the Applicant from the branch location without his prior approval and following further discussions directly between the parties hereto during February 1975, the Registrar issued, and caused to be served upon Applicant, notice of his proposal denying registration for the purpose of a branch office for reasons fully stated therein on the ground that Applicant's conduct in proceeding to operate a branch dealership without the authority of registration and indeed after being forbidden to do so, gave rise to the belief that it would not carry on business in accordance with law and with integrity and honesty. Applicant therefore requested a hearing pursuant to section 7 of the Motor Vehicle Dealers Act.

Evidence indicated Applicant had secured a Garage "A" licence, one of the Registrar's requirements for approval of the branch premises, by supplying the registration number of the principal dealership and by refraining from advising the issuer that it was proposed to deal in motor vehicles, two misleading pieces of information. Applicant had further displayed a name at the place of the branch business not approved by the Registrar contrary to the Regulations under the Motor Vehicle Dealers Act. The chief objection of the Registrar to granting approval to the branch location was that it would be operated in, and around the parking lot of, a "drive-in take out" food stand which would create confusion in the public mind as to the identity of the business proprietor and because it would be unsafe for automobile customers to be in the path of the cars driven by the drive-in customers. Concerning the allegation that business had begun to be conducted at the new location, applicant denied this admitting only that vehicles were being merely displayed, and that any consequent transactions were completed at the main dealership location. For the foregoing reasons and without accepting Mando's explanations or plea that he hadn't known he required approval for the branch, the Tribunal was of the view that Registrar's requirements were reasonable in insisting on a permanent separation fence between the dealer's business area and that of the drive-in food location.

ORDERED: Branch registration should be granted providing a permanent fence in a location approved by the Registrar be first installed.

L & S MOTORS and
CHARLES W. LAMANES

1975
HAMILTON
OCT. 29

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
CAMERON C. HILLMER and
WILLIAM J. BAILEY, MEMBERS

COUNSEL: DAVID F. SMYE for Applicant
VIRGINIA MACLEAN for Respondent

NOVEMBER 13TH, 1975

Proceeding under section 7 of The Motor Vehicle Dealers Act, Applicant Lamanes, operating a motor vehicle dealership under the name of L & S Motors, as proprietor and as salesman therefor required a hearing by way of review of the Registrar's proposal to suspend for six months Applicants' registrations as motor vehicle dealer and salesman respectively. The Registrar furnished Applicants with reasons for his proposal namely, the dealer's failure to maintain the statutorily required trust account ledger, trust bank account, and other records, the apparent procurement of the rolling-back of some 22 automobile odometers of cars sold at retail and the conviction of Lamanes under the Ontario Highway Traffic Act for falsely issuing a Safety Standards Certificate.

The Applicants admitted the above allegation of odometer tampering and evidence presented indicated an aggregate of 768,145 miles on 22 vehicles had been rolled-back. Lamanes admitted the above conviction and the commission of another offence of falsely issuing a Safety Standards Certificate. Three purchasers of used vehicles testified that they would either not have bought them at all or at reduced prices had the true mileages been apparent.

Lamanes' explanations amounted to admissions of odometer tampering and his failure to maintain trust accounts but he denied responsibility in the matter of improper inspection and issuance of the false fitness certificate as alleged. There were offered a number of written character references as to his reputation, business and otherwise.

(cont'd)

ORDERED: Registrar's proposed six months' suspension of Applicants' registration is confirmed; upon renewal, registrations to be subject to conditions for further five and one-half months.

1975

KALEVI PERALA

Applicant

TORONTO
DEC. 10

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
 MRS. HELEN MORNINGSTAR and
 R.J. RUMBLE, MEMBERS

COUNSEL: GEORGE A. WOOTTEN, Q.C., for Applicant
 A. N. MAJAINA, for Respondent

JANUARY 16TH, 1976

Applicant, having been refused registration as a motor vehicle salesman under The Motor Vehicle Dealers Act ("the Act") by the Registrar's proposed decision dated November 6, 1975, he required a hearing pursuant to section 7 of the Act. The Registrar's refusal was based on Applicant's past conduct affording him, he stated, reasonable grounds for the belief that Applicant would not carry on business in accordance with law and with integrity and honesty (section 5 - ss. 1 (b) of the Act). Particulars of the conduct complained of included Applicant's active business association with two automobile salesmen, William Roddy and Stanley Mazur whose registrations were, at the material period under review, under suspension.* Moreover, Applicant had been the subject of a proposal by the Registrar in December 1973 which finally revoked his registrations as dealer and salesman effective January 10, 1974, substantially on the same evidence as now offered by the Registrar in support of the present refusal.

Applicant, 41, married with two dependants, admitted through counsel at the hearing a catalogue of some 461 used cars sold over a two-year period by his former dealership substantially all sold at wholesale after the odometers had been rolled back. The mileage spun off aggregated over 10 million miles and a calculation of the gross profit arising from such sales indicated an amount of \$128,267. Although there had been limited opportunity to do so, since all except 30 sales were not to members of the public, Applicant made no move towards restitution to any of the purchasers.

(cont'd)

* See Tribunals' decisions - Summaries of Decision - Wm. Roddy (Vol. 2) and Stanley Mazur (Vol. 3).

Applicant had been under the care of a psychiatric medical specialist who reported him as having been hospitalized and subsequently treated for reactive depression due to an inadequate personality complicated by excessive alcoholic drinking. Three character witnesses testified as to Applicant's reputation for honesty and integrity, socially and in business. Tribunal found, based on the above admissions, that Applicant had been the instrument of considerable financial harm to the car-buying public, had personally profited considerably thereby and had failed to show any material alteration in his disposition to continue to cause public harm.

ORDERED: Registrar's refusal to register is sustained.

1975

TORONTO

NOV. 4, 1975

WILLIAM ROBERT RODDY

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: H.F.H. SEDGWICK, VICE CHAIRMAN, AS CHAIRMAN
HELEN J. MORNINGSTAR and
ROBERT H. FOSTER, MEMBERS

COUNSEL: DOUGLAS E. ROLLO, Q.C., for Applicant
A.N. MAJAINA for Respondent

DECEMBER 31ST, 1975

Having been refused registration as a motor vehicle salesman by the Registrar by his proposal with detailed reasons, Applicant required a hearing to obtain a review of the Registrar's decision pursuant to section 7 of The Motor Vehicle Dealers Act. The facts surrounding such refusal were unusual in that, by its decision in March, 1973, the Tribunal had suspended Applicant for three months ending in June 1973 when he would have been able, upon applying, to have his registration restored but upon specific conditions. Although thus entitled, Applicant delayed making application for two years and it was then disclosed that he had become bankrupt in 1973 and remained undischarged. The Registrar's refusal to register him, now appealed, was obviously based not only on Applicant's undischarged bankruptcy status but also on his activities in the automotive business before and after the declaration of bankruptcy and other disclosures in his application. Briefly the Registrar found fault with his having associated for seven months as office manager with an automobile dealership whose registration was subsequently revoked for wholesale roll-backs of used car odometers. Registrar further alleged Applicant had associated with persons, apparently as adviser, who purchased cars using, without his knowledge or authority, the name of a legitimate dealer.

The Tribunal found evidence that applicant was 50 years old, married with one dependent, and had been first registered as a motor vehicle salesman in 1965 and, with one short interruption, continuously until June 1973. During his suspension Applicant had consecutively

(cont'd)

worked as office manager of a used car dealer as above mentioned, as a car buyer for an illegitimate car dealer in Montreal, in some undefined capacity with a restaurant chain and been unemployed. Although alleged by the Registrar, the evidence fell short of establishing improper activity by the Applicant in his business association with several used car dealers, in view of his unregistered status. The Tribunal was prepared to grant registration upon the conditions that Applicant should first receive his discharge from bankruptcy, that any future affiliation with automobile dealers be approved by the Registrar, that his employment in the industry be restricted to that of salesman and not as investor, and to his good behaviour relevant to his fitness as motor vehicle salesman.

ORDERED: Registrar to grant registration upon conditions.

1975

KINGSTON

MAR. 21

ROY'S AUTO WRECKERS and RUTH BILOW
Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS & SALESMEN
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and ELLERY MALONEY, MEMBERS

COUNSEL: GEORGE A. WOOTEN, Q.C., For Applicant
M. VIRGINIA MACLEAN, For Respondent

APRIL 9TH, 1975

Ruth Bilow, as sole proprietor of Roy's Auto Wreckers, applied for and was refused registrations as motor vehicle salesman and dealer respectively, for reasons fully stated by the Registrar in his proposed decision from which Applicants now appeal by way of a hearing under section 7 of the Motor Vehicle Dealers Act duly required by them. The registrar's grounds for such refusals were briefly that the dealership known as Crescent Motor Sales, which had been carried on by her husband Roy Aaron Bilow until his registrations as dealer and salesman were revoked by this Tribunal by its decision in April, 1974 was the same business for which registration is now being sought by his wife and that the decision of this Tribunal in revoking the former dealer and salesman registrations disclosed grounds to justify the Registrar in refusing the present applications. These were, briefly stated, that Roy Aaron Bilow had been found guilty of possessing stolen motor vehicles, that he had retained the services of an unregistered salesman and that either he or his wife had deliberately provided false statements in an application for renewal of registration with intent to deceive the Registrar.

Evidence disclosed that the Applicant Ruth Bilow had continued to carry on the business whose registration had been revoked as aforesaid contrary to the Motor Vehicle Dealers Act while she herself was not registered as either dealer or salesman. Notwithstanding this adverse fact and her probable complicity in connection with falsely completed application for renewal of registration of her husband's former dealership, the Tribunal was impressed both by Ruth Bilow's tenacity in wishing to support her family by continuing his former business and by impressive character evidence offered on her behalf and the lack of any complaints received from customers of the business. The Tribunal was prepared to provide Ruth Bilow with the opportunity to carry on, in her own name, the business formerly carried on by her husband provided she did not permit his name to be associated with her business and at premises removed from the present business of her husband, always subject to good behaviour and inspections by representatives of the Registrar.

ORDERED: Registrar's refusal to grant registration is set aside; registrations applied for to be granted, the dealership not to be in the name applied for and subject to the conditions indicated above.

JULY 8

JOHN C. SABOURIN

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and J.T. HOGAN, MEMBERSCOUNSEL: M. VIRGINIA MACLEAN and TOM MATZ for
Respondent
APPLICANT in person

JULY 14, 1975

Applicant required a hearing for the purpose of a review of the Registrar's decision proposing suspension for one month of Applicant's registration as a motor vehicle salesman for reasons fully stated therein which, it was alleged, constituted past conduct providing reasonable grounds for belief that he would not carry on business within the law and with integrity and honesty. The conduct complained of involved making a seriously false statement in his application for registration relating to his fitness as a salesman, carrying on business as a salesman while not duly registered as employed with a dealer, both acts being contrary to the Motor Vehicle Dealers Act and regulations. It was further alleged Applicant had injured his employing dealership by professing to "throw in" two new radial snow tires and rims in a new car deal without the dealer's authority but which the dealer felt constrained to honour at his cost to preserve customer good-will.

Applicant, 51 years of age, had been registered as a salesman for two and a half years with a total of eight employers, had been dismissed on one occasion for absenteeism and on another for being intoxicated while driving dealer's demonstration automobile.

(cont'd)

The foregoing facts were proved and Applicant's explanations offered during his oral testimony were unconvincing.

ORDERED: Registrar's proposed suspension for one month upheld; if and when renewed, registration to be subject to conditions of non-contravention of the Motor Vehicle Dealers Act and good behaviour.

AUG. 12

ARNOLD JOHN VAN VILSTEREN
Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and J. T. DAVIDSON, MEMBERS

COUNSEL: APPLICANT in person
TOM MATZ for Respondent

AUGUST 18TH, 1975

Applicant, a registered motor vehicle salesman, required a hearing by way of review of the Respondent Registrar's proposal to revoke such registration on the basis that Applicant's past conduct afforded reasonable grounds for belief he would not carry on business in accordance with law and with integrity and honesty. The reasons for such belief on the Registrar's part, fully stated in his proposal, were that Applicant had deliberately provided false answers in his sworn application for registration in concealing the fact that he had a record of convictions over a 12 year period including break and enter, forgery, uttering forged documents and that a charge of theft was pending. It was also alleged he had lied to the Registrar in asserting he had revealed his record to his employer.

His application, verified by his affidavit sworn apparently on April 3rd, 1975, contained his negative answer to the question whether he had ever been charged, indicted or convicted anywhere of a criminal offence or if there were any (such) proceedings pending at the time of such application. Certificates were offered proving his conviction on three charges of break and enter, eleven charges involving forgery, two charges involving fraud and one of theft. Of these seventeen convictions, all save two, were registered against "Harry Wyntjes" and two against "Arnold John Van Vilsteren".

and Applicant acknowledged all, and that his trial on a charge of theft of musical instruments was pending. The sales manager of Applicant's present employing car dealer testified Applicant had revealed to him only that he had been in trouble and was on probation but hired him notwithstanding and was prepared to continue to do so in a gesture towards his rehabilitation. Applicant produced two commendatory letters, from The Salvation Army for his work and help to others over six months, and from his probation officer expressing her opinion that he had sincerely reformed. The Acting Registrar testified concerning Applicant's deceit regarding his admission of past conduct to his employer.

Tribunal found Applicant had deceived the Registrar and his employer concerning his considerable criminal record and could not therefore be trusted in dealing with the public.

ORDERED: Registrar will carry out his proposal to revoke Applicant's registration.

R 133

TORONTO
1975

MAY 2, 5

WHITNEY CAR SALES LTD. and WALTER WHITTEY
Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W.W. EVANS, C.A. and FRANK ROWLAND, MEMBERS

COUNSEL: DOUGLAS E. ROLLO, Q.C., for Applicant
M. VIRGINIA MACLEAN for Respondent

MAY 29, 1975

Applicants, holding registrations as motor vehicle dealer and salesman respectively, required a hearing pursuant to Section 7 (2) of The Motor Vehicle Dealers Act to review the proposal of the Respondent Registrar to revoke such registrations under Section 6 (2) of such Act. The ground furnished by the Registrar in his proposal was under Section 5, namely, that having regard to applicants' past conduct the Registrar could reasonably conclude that they would not carry on business within the law and with integrity and honesty.

Applicant Whittey, a motor vehicle salesman of 17 years experience, had operated a dealership for the past nine years, most recently as Whitney Car Sales Ltd. Following a consumer complaint, an inspection under Section 23 of The Motor Vehicle Dealers Act of the dealer's garage register and sales records revealed that the business was one of wholesaling used cars, in fact, that in a period of eight and a half months 507 units had been sold. More remarkable, however, was the fact that 74 of these sales were of unfit vehicles, 26 to females. After endeavouring to locate the transferees of these unfit vehicles by means of the names and addresses in the garage register the inspector concluded that almost all were fictitious.

(cont'd)

Following such inspection the Applicant was given an opportunity to explain the situation to the Registrar when he admitted using fictitious names. When offered continued registration subject to terms including that of spot inspections without notice, Applicant declined the terms and Registrar accordingly proposed the revocation now under review.

Donald Smith alias Malvin Smith and Sidney Goddard, persons convicted of dealing in automobiles while unregistered, and whose names appeared frequently in the garage register as purchasers of unfit vehicles from the Applicant dealer, testified that they had made many more purchases under assumed names. Three witnesses testified that they were the ultimate purchasers of three of these vehicles sold as roadworthy to them by private sale by Goddard's wife using assumed names. Both vehicles proved to be mechanically faulty although certificates of mechanical fitness were received on delivery. The register revealed multiple sales to one Silkstone who was not a registered dealer or salesman.

Applicant Whittey admitted knowing and doing business with Sidney Goddard (but denied knowing his wife) and acknowledged selling cars to Silkstone transferring them to names furnished by Silkstone. He admitted making sales to Donald Smith as Austin Smithers and Malvin Smith, among others. He testified making many sales of unfit vehicles to persons not previously known to him but denied having transferred such vehicles to fictitious names as allegedly admitted by him to the Registrar. Applicant Whittey further admitted discrepancies and omissions in his garage register.

The Tribunal found Applicant knew of the fictitious nature of names and addresses in the register, that the Goddards, Smith and Silkstone were unregistered as dealers and that purchases by them were for purposes of re-sale and that where such purchases were of unfit vehicles these would be resold as roadworthy to the risk of innocent members of the public. The Tribunal concluded the Registrar was justified in concluding Applicants' past behaviour provided reasonable grounds for believing they would not carry on business in accordance with law or with integrity and honesty but that, having regard to their previous good record of long standing and lack of complaints against them, the Registrar's proposal was too harsh.

(cont'd)

ORDERED: Applicants' registrations to be suspended for two months and upon reinstatement to be subject to conditions of good behaviour and peremptory inspection of all books and records for a period of sixteen months.

ALLEN FRANK ARNOLD AND
RAYMOND FRANK WILSON

Applicants

and

1975

TORONTO

June 4, 6, 9-13

inclusive

July 21, 23

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and J. VOORTMAN
MEMBERS

COUNSEL: AUSTIN M. COOPER, Q.C., for Applicants
A.N. MAJAINA and THOS. MATZ for
Respondent

SEPTEMBER 3RD, 1975

Applicants Arnold and Wilson, respectively registered real estate broker and salesman, required a hearing pursuant to section 9 of The Real Estate and Business Brokers Act ("the Act") to review the proposed decision of the Registrar (Respondent) respecting both registrants to revoke their registrations on grounds firstly, that they were lacking in financial responsibility (withdrawn by Respondent at the opening of the hearing), secondly, that their past conduct afforded reasonable grounds for Registrar's belief that they would not carry on business within the law and with integrity and honesty, and thirdly, that if allowed to continue in business they would be in contravention of the Act.

The complaints referred to a number of transactions in which Arnold or Wilson, usually both, were active in one or more capacities as listing agents of vendors of properties, selling agents of such properties, commission agents for purchasers of second mortgages commonly taken back by such vendors, and, in some cases, in thus turning the same properties over several times. The Registrar's allegations which were levelled in every case against one or the other or both Applicants were as follows: 1) breaches of section 42 of the Act in their failure to disclose their interest or capacity in purchases they made or arranged to be made on their behalf; in failing to disclose to vendor-clients facts within their knowledge affecting the value of real estate when accepting listings from them and in executing sales for them; and in failing to disclose to vendor-clients who listed

(cont'd)

properties through them the existence of negotiations or agreements secretly arranged by them as broker or salesman for the sale or other dispositions of such properties; 2) The Registrar further alleged breaches by Applicants of their fiduciary duties to principal vendors of real estate in failing to disclose to them material facts relevant to value and in keeping from them the fact that they were receiving commissions from mortgagees on negotiating placement of first mortgages, commissions by way of finders' fees from buyers of second mortgages to be taken back by such vendors from purchasers of their properties; 3) breaches of section 35 of the Act by Applicants in failing to furnish written evidence of representations and promises they allegedly made to induce persons to purchase, sell or exchange real estate; 4) breaches of section 41 of the Act in accepting commissions from other than their employing broker, or alternatively, for acting for others while simultaneously engaged to their employing broker, contrary to section 41 of the Act (Registrar furnished a list of over 20 transactions which was substantially accepted by Applicants as instances of their receiving commissions, split evenly between them, paid them by second mortgage dealers); 5) in furnishing false information in statements required to be furnished purchasers under the Act (section 42 (1)); 6) through inducing clients to enter into improvident transactions in the sale of second mortgages at excessive, exorbitant or unconscionable discounts to their own profit through secret commissions to them from the purchasers of such mortgages fixed at rates in direct proportion to such discounts; 7) in deceiving or misleading clients through misconduct or misrepresentation or by omissions in their duty, to the injury of such clients; 8) in unjustly enriching themselves through secret commissions and multiple sales, to the detriment and loss of their clients.

Extensive evidence was received concerning Applicants' activities in connection with seven properties, four involving multiple transfers. The Tribunal's findings upon the evidence in connection therewith, when categorized under the allegations as numbered above were:

- 1) breaches of section 42, in five instances
- 2) being in fiduciary relationship to clients, in breach of their duty thereto, in eight instances
- 3) breaches of section 35, in one instance
- 4) breaches of section 41, in five instances and in all twenty instances in the list above referred to

(cont'd)

- 5) furnishing false information, in one instance
- 6) inducement to enter improvident contracts for sale of second mortgages, in one instance
- 7) deceit calculated to injure clients, in three instances
- 8) no finding

Applicants, young men with no considerable experience in real estate, operated as partners in obtaining listings of real estate, selling such real estate and second mortgages usually produced in the type of transactions they most frequently dealt in, that is to say, medium to lower priced houses and condominiums. At the material time such properties were rising quickly in value and speculation was widespread. When advised of the illegality in their practice of receiving under-the-table commissions on discount sales of second mortgages they immediately took steps to correct their procedures so that resulting commissions were thereafter paid directly to their employing broker and thus in conformity with section 41 of the Act. Applicants were able to satisfy the Tribunal that they had put forward suggested asking prices only after they had carefully analysed the market conditions and compared the property to be listed with comparable properties of known value. They also took pains to show vendors exactly the prospective amount of the net return they would receive through accepting of offers presented. There was evidence that the practice of mortgage brokers in paying commissions directly to real estate salesmen was almost universal until recently questioned for the first time, presumably in the course of the Registrar's investigation of Applicants' operations.

The Tribunal found, with respect to such commissions, that Applicants were in breach of a duty to advise their principals having regard to their fiduciary relationship to them. Definition of the nature and extent of the duty of agents finding themselves in a fiduciary position with respect to principals was found in three cases: Chas. Baker Ltd. v. Baker [1954] O.R. 418 at 430; Regal (Hastings) Ltd. v. Gulliver [1942] 1 All E.R. 378 at 381; Christie v. McCann [1972] O.R. (Vol.3) 125 at 127.

The Tribunal was of the opinion that the Registrar was justified in viewing Applicants' conduct as supporting the view that they had not carried on business in accordance with law and integrity but, in mitigation, noted that they had promptly corrected their former practice with respect to commissions paid them contrary to section 41 and because there seemed to be no previous or other complaints from clients the Tribunal considered a two-month suspension, rather than revocation, adequate and sufficiently salutary in the circumstances.

(cont'd)

ORDERED: The Registrar's proposal to revoke registrations is set aside; there will be a two-month suspension of the registrations and following resumption of registration, conditional for a one year period on good behaviour

APR. 1

GEORGE DASSINGER

Applicant

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
RespondentTRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and IAN JUSTIN, MEMBERSCOUNSEL: L.J. O'CONNOR for Applicant
M. VIRGINIA MACLEAN for Respondent

APRIL 15TH, 1975

Applicant gave notice requiring a hearing surrounding the proposal of the Respondent Registrar to revoke his recently acquired registration as a real estate salesman for reasons set forth by the Registrar in his proposal which were, very simply, that Applicant had deceived those dealing with his application for registration by two false pieces of information concerning his activities as a motor vehicle dealer and salesman in the recent past and indeed at the time of such application. The Respondent asserted that, but for this deception, Applicant would not have received registration as a real estate salesman and that this conduct afforded grounds for his belief that Applicant would not carry on business in accordance with law and with integrity and honesty.

Applicant, age 54, had had a career in the automobile business as owner and operator of an incorporated dealership since 1948 becoming registered as salesman and dealer from the commencement of the registration system in 1965. At the beginning of 1972 he caused the incorporated company to transfer its Chrysler franchise together with its fixed assets to another dealer and to retain only a number of used cars which were presently sold at wholesale, about 10 car leases which it was intended to retain until expiry when the vehicles would be recovered. The chief remaining asset of the company was the business premises which was leased to the purchasing dealer and the office of the company was moved to temporary premises to which his Garage "A" licence was transferred because he understood that such was required in order that the winding up and disposal of the remaining assets could be conducted from there. The foregoing

(cont'd)

transations and arrangements were within the knowledge of the local inspector appointed to administer the Motor Vehicle Dealers Act. The Applicant's situation was, therefore, in May 1973 when he completed his application for registration as a real estate salesman making therein the complained of statements, that he had retired from the automobile business save for his activities in winding-up that business, namely, in collecting rents for the leased vehicles and in disposing of the lease-expired vehicles, a condition he characterized in the application as "semi-retired" with a negative answer to the query whether he would be employed or engaged in any business occupation or profession other than as a real estate salesman. He did not surrender his automobile registrations thinking he would need them in disposing of the remaining leased vehicles after their return and he explained his failure to notify the Registrar's office of the change in location due to his mistaken understanding that the transfer of the Garage "A" licence he had arranged with the local inspector was sufficient notice to the former.

Eventually, following a joint meeting with the Registrars under the Motor Vehicle Dealers Act and the Real Estate and Business Brokers Act, Applicant received shortly thereafter notice of proposals from both, revoking respectively his automobile and real estate registrations, the latter which he thereupon appealed by way of this hearing.

Impressed by Applicant's sincerity, manner of testifying and truthfulness, and accepting his explanations as rebutting the balance of probability which it deemed the Respondent had failed to establish, Applicant had achieved compliance in the matter of dual registration at least two months prior to the hearing, Tribunal could not sustain the Respondent Registrar in the present proposal.

ORDERED: Applicant will retain his registration as real estate salesman.

1975

JOSEPH BOSCO REAL ESTATE LIMITED
AND JOSEPH BOSCO

Applicants
and

OSHAWA
MAY 8, 9, 12-16
TORONTO
JUNE 16-20
" 23, 24

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR and
KENNETH S. RAVEN, MEMBERS

COUNSEL: Wm. R. McMURTRY, Q.C., and
HARRY LIPTON for Applicants
A.N. MAJAINA and THOS. MATZ
for Respondent

AUGUST 19TH, 1975

Applicants Joseph Bosco Real Estate Limited ("the broker company") and Joseph Bosco ("the broker") applied under section 9 of The Real Estate and Business Brokers Act ("the Act") for a hearing to review the Registrar's proposal that the registrations of both Applicants as real estate brokers should be revoked for reasons set forth at considerable length and in detail. The matters complained of were categorized in eight general allegations of past conduct deemed by The Registrar to afford reasonable grounds that the broker company's business would not be carried in accordance with law, integrity and honesty and, if permitted to continue, both Applicants would be in contravention of the Act.

Such allegations were, firstly, of obstruction of the investigator duly appointed under section 27 (a) to investigate, under order of the Director of the Consumer Protection Division ("the Director"), whether contravention of the Act and Regulations thereunder had occurred by the withholding of information and records contrary to subsection (3) of section 27 (a); secondly, of furnishing false information in four annual statutory returns required from the broker company and supported by affidavit of the broker as an officer thereof testifying as to the truth of the information therein; thirdly, of the contravention of section 42 of the Act by the broker company, the broker and certain salespersons in their employ in purchasing real estate for resale without simultaneously disclosing such fact in writing to the vendors and receiving their acknowledgement and in failing to disclose

(cont'd)

in writing to vendors listing real estate with the broker company all facts within their respective knowledge affecting the resale value thereof or as to the existence of negotiations or agreements, if any, for its sale or other disposition; fourthly, that the broker company, broker and certain of their salespersons by their conduct breached their respective fiduciary duties as agents towards their principal vendors of real estate contrary to the latters' best interests by failing to disclose material facts relative to the value of such real estate; fifthly, that Applicants purchased, or caused to be purchased or connived at the purchase by certain employees of properties and in having title thereto taken by nominees and in some cases of re-selling or causing the resale of such properties through nominees other than those first taking title; sixthly, that Applicants had unjustly enriched themselves by receiving unearned commissions on sales of real estate at the expense of their client vendors; seventhly, that client vendors suffered monetary loss through deceit, misrepresentation or malfeasances of salespersons in Applicants' employ; eightly, that Applicants' office record-keeping was at fault.

Applicants' counsel endeavoured throughout to establish that a bias against the broker was present in the mind of the investigating officer appointed by the Director resulting in prejudice to the Applicants. Considerable time and energies of both counsel were expended in this endeavour but the Tribunal found the evidence fell short of demonstrable proof of such bias and prejudice during the officer's investigation and at the hearing. However the Tribunal commented unfavourably upon the Director's refusal to substitute another inspector to carry out the investigation of Applicants' affairs when reasonably requested to do so by Applicants' counsel who cited past unpleasantness between the broker and inspector while both had been directors holding office on the Oshawa Real Estate Board.

The Tribunal's findings in respect to the eight allegations above-stated were as follows, seriatim:

- 1) obstructing investigation and withholding returns: not proven although Applicants, apparently on the advice of their solicitor, unduly and unreasonably delayed furnishing information requested in turn by the Director and the Registrar.
- 2) furnishing false information in annual returns: proven, a contravention of section 63 (1) of the Act.
- 3) section 42 contraventions: in respect of three transactions by a salesman, not proved; in respect of two transactions by the broker and one by his wife, an officer of the broker company,

(cont'd)

contraventions in not informing vendor of the broker's capacity; in respect of eight transactions by nominees, not proven; in respect of a transaction by the broker and a salesman, proven; in respect of a transaction by two salespersons of the broker, contravention of section 42 (1) in not disclosing their interest; in respect of a transaction by a salesperson in Applicants' employ and her husband, a technical contravention of section 42 (1); in respect of one transaction by a nominee no evidence was called by the Registrar who also withdrew his allegations respecting four more transactions during the hearing calling no evidence in respect thereto; in respect of a transaction by a salesperson in employ of Applicants, proven contravention of section 42 for which the Tribunal blamed the Applicants for failing to supervise; in a transaction of purchase by the son of two salespersons in Applicants' employ, a contravention of section 42; in a transaction of sale through Applicants by one of their salesmen, no contravention; in a transaction where Applicants purchased a "trade-in property" through a nominee company (disclosed as such), a technical breach of section 42 (1) in failing to proceed as therein specified.

- 4) breaches of fiduciary duty as agents to principal vendors: in respect of one transaction by a salesman of the Applicants the Tribunal found a breach of the law of agency requiring the agent (salesman) to acquaint the principals (vendors) of the potential value of the property purchased by such agent and for such the Tribunal held Applicants responsible.
- 5) Applicants purchasing, or causing to be purchased, properties which were re-sold through nominees: The Tribunal found no illegality in such cases.
- 6) that Applicants had unjustly enriched themselves: the Tribunal declared it lacked jurisdiction, not being a court of law, to determine such matters.
- 7) that client-vendors were damnified through deceit etc.: the Tribunal referred to its findings under (4) above.

The broker, Bosco, 42, had been in the real estate business for 20 years, enjoyed a good reputation for honesty and integrity in Oshawa whose Real Estate Board he had served including the presidency. The Tribunal was of the opinion that it was not a case for revocation or suspension but would attach conditions to a continued registration.

(cont'd)

ORDERED: The Registrar's decision to revoke is set aside; registrations to continue subject for one year's duration to the following conditions; - good behaviour of Applicants and employed salespersons; inspection without notice; immediate notification to Registrar of all associated companies, partnerships, consortia, and joint enterprises involved in real estate trading; employed salespersons buying real estate to do so only through Applicants as brokers.

1975

TORONTO

JAN. 28, 29, 30

LORNE BANKS REAL ESTATE LIMITED
and LORNE BANKS Applicants

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
KENNETH SMITH and W.J. BINGLEY, MEMBERS

COUNSEL: S.E. KIRSH, for Applicant
A.N. MAJAINA, for Respondent

FEBRUARY 26TH, 1975

Applicants required a hearing pursuant to section 9 of The Real Estate and Business Brokers Act in order to obtain a review of the Respondent Registrar's proposal to revoke their registrations as real estate brokers under such Act on the same grounds, namely, that their past conduct afforded reason for the belief that, if allowed to continue in business, it would not be conducted in accordance with law and with integrity and honesty and that their activities were, or will be, in contravention of said Act. The particulars of their conduct complained of by the Registrar were furnished in detail and referred to a series of four transactions in which Lorne Banks, variously as principal, trustee or through an associate and nominee, having contracted with the owners to purchase residential properties, failed to complete such transactions to the financial detriment and loss of such owners. Registrar further alleged breaches by Applicants in their fiduciary duty to their principal vendors in failing to disclose material facts.

Lorne Banks, age 30, had been first registered as a real estate salesman in 1967 and as a real estate broker in 1973. In the following year Banks caused his brokerage business to be incorporated and registered as broker, and, as chief officer and operator, retained his status as registered broker.

Applicants offered a guaranteed sale to owners of a residential property whereby in the event that, as brokers, Applicants were unable to find a willing purchaser at the listed or a better price, as principals they were bound to purchase the property at the listed price less the usual commission. Applicants failed to accomplish a sale or to complete the agreed purchase to such owners' substantial financial loss in liquidated damages sustained through their failure to complete a purchase entered into in reliance on Applicants so-called "guaranteed purchase".

Applicant Banks having, as trustee, agreed to purchase two residential properties, failed to complete either purchase thus causing financial loss to the owners through their inability to complete contracts of purchase and sale entered into in reliance on the supposed "sales" to Banks.

An inspection of the office records of the Applicants at their place of business by an inspector deputized by the Respondent revealed no irregularities in its trust account and the absence of certain trade records required to be kept by the The Real Estate & Business Brokers Act and regulations. Incomplete answers were obtained from Banks concerning his relations with two business friends in an informal partnership and an incorporated company, both used as vehicles for speculation.

Banks' testimony was that his ventures in speculation were thwarted by a tightening of mortgage money and resulting fall-off in market prices and that, as these factors were beyond his control, he was innocent of the charge of financial irresponsibility. He was able to explain a number of alleged shortcomings but his argument that he was not at fault in failing to disclose the existence and activities of the associated partnerships, informal and corporate, in annual returns or to apply for registration, was not accepted. The Tribunal found the conduct of Applicants financially irresponsible but not of so serious a nature as to justify revocation. In its reasons mention was made of Banks' improving financial situation.

ORDERED: Applicants' registrations will be suspended for one year and after re-instatement, to be subject to conditions of good behaviour for further three year period.

LARRY WILLIAM PAYETTE
Applicant
and

1975
TORONTO
Nov. 25, 26, 27
28.
Dec. 1, 2, 3, 5,
18, 19, 23.

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W.W. EVANS and H.C. McARTHUR,
MEMBERS

COUNSEL: ROBERT G. LAWRIE, for Applicant
VIRGINIA M. MacLEAN and WILSON LEE,
for Respondent

FEBRUARY 17th, 1976

Respondent having proposed revocation of Applicant's registration as a real estate salesman under The Real Estate and Business Brokers Act ("the Act"), Applicant required a hearing in respect of such proposal as provided in section 9 of the Act. The Registrar's stated grounds for revocation were that Applicant lacked financial responsibility having regard to his financial position, that his past conduct indicated he would not carry on business in accordance with law, integrity and honesty and that if allowed to continue in business as a real estate salesman, based on his past activities which did not meet the requirements of the Act, Applicant would be and remain in contravention thereof. Particulars furnished by the Registrar in support of the stated grounds were that Applicant, while a real estate agent, had - 1) failed to properly notify the Registrar of commencement and termination when changing his employment contrary to section 32 (2) (b) of the Act; 2) through his wholly-owned real estate company, Trymin Holdings Limited ("Trymin") caused to be purchased a property listed with his employer-broker Royal Trust Company, in a manner giving rise to doubts concerning his fitness as a salesman in regard to his honesty and integrity; 3) used Trymin as a vehicle for trading in real estate by guaranteeing or assuming guarantees of sale of certain properties listed with Cobblehill Real Estate Limited ("Cobblehill"), a real estate brokerage with which he was closely associated if not controlling, knowing or having reason to know Trymin's inability to perform same; 4) in promising to give or assume such guarantees to purchase or sell real estate as an inducement to clients of Cobblehill to purchase other real estate, failed to comply with section 35 of the Act; 5) obtained mortgage loans on the security

(cont'd)

of real estate represented to have values in excess of the true worth thereof; 6) held himself out as a real estate broker not being so registered contrary to section 38 of the Act; 7) traded in real estate as a broker not being so registered contrary to section 3 (1) (a) of the Act.

Applicant, 33, divorced with two dependants was first registered as a salesman in February, 1973 with Royal Trust Company which operated an office in Oakville, Ontario, where he quickly achieved top ranking as a salesman and obtained experience in selling and in the technique of guaranteeing sales at agreed prices then widely in use in the industry to stimulate listings and secondary sales. Towards the end of his eighteen months at Royal Trust, Applicant began to form the intention to qualify as a broker as quickly as possible, which would be in March, 1975, if he were to satisfy the normally required two years' experience as a salesman. In furtherance of his objective he sought to enlist a registered real estate broker of experience in the person of Mrs. Dorothy Hutton ("Hutton") as a partner and the two apparently reached agreement upon a modus operandi. Applicant and Hutton entered into a formal agreement the provisions of which the Tribunal could only elicit from them since all copies were soon deliberately destroyed on the advice of counsel that the intent of the agreement was in conflict with the Act. Whatever its effect, in pursuance of the parties' agreed plan, in July 1974 Hutton became the incorporator, chief officer and sole shareholder of Cobblehill and the broker thereof, as required by the process of registration. Apparently it was understood that the incorporator's share would be transferred to the Applicant on demand which it was contemplated he would do upon obtaining broker registration; (the share representing the entire equity in Cobblehill, was later transferred for consideration by Hutton to a registered broker who succeeded to her former position). The legal and incorporation fees of Cobblehill and its working capital were apparently supplied by the Applicant. Following considerable initial success problems began to develop in Cobblehill due to the liquidity requirements in financing guaranteed sales which strained Cobblehill's resources which depended not only on its own cash flow but upon the resources of Trymin, Applicant's corporate vehicle for supplying financing and the assumption of certain liabilities of Cobblehill. As Cobblehill began to falter in making good its guarantees, Hutton and Applicant had a falling-out. The Tribunal heard a mass of testimony, much of it conflicting, surrounding the internal management of Cobblehill, its methods of operation, the partners' roles, the retirement of Hutton and the recruitment of a necessary successor broker, and finally the cessation of operations. Its demise was assured following action by the Oakville Real Estate Board in suspending its membership and the resulting investigations by the Registrar whose inspectors found ultimate financial chaos.

(cont)

Necessary to its decision, the Tribunal found, in respect of the Registrar's allegations above-stated, as follows:

- 1) Applicant failing to notify details of change in employment - no finding.
- 2) Applicant's conduct in a real estate purchase by Trymin through his employer, Royal Trust - no fault in respect thereto.
- 3) Applicant, through Trymin, traded in real estate by guaranteeing or assuming guarantees and failed to honour same - in four transactions, guarantees or trade-in arrangements failed for lack of funds needed to close.
- 4) Applicant, through Cobblehill, promising or representing to offer guarantees of sale to prospective clients as inducement to list properties, failing to contemporaneously supply such guarantees in writing, contrary to section 35 of the Act. - five transactions involving guarantee of sales or trade-ins of property were in breach of section 35, to the inconvenience if not injury of the clients acting in reliance thereon.
- 5) Mortgage loans - in one instance, in arranging to obtain on behalf of Trymin, a second mortgage on vacant land in Muskoka on the strength of a highly inflated valuation obtained six months previously, to the injury of the mortgagees who were obliged to sue and eventually accept and realize on collateral security.
- 6) Representing himself as a broker, contrary to section 38 - proved; Applicant's effort to circumvent the section through the corporate device of Cobblehill and with the complicity of two registered brokers was a transparent deception.
- 7) Trading as a broker contrary to section 3 (1) (a) - proved.

In summation, the Tribunal concluded that Applicant's conduct had been such as to give rise to a belief on the Registrar's part that he would not carry on business within the law and with integrity and honesty. The Tribunal noted, however, that Applicant had already suffered grievous financial loss and in personal prestige while endeavouring voluntarily to make restitution to, and adjustment with, clients in mitigation of losses.

(cont'd)

ORDERED: Instead of revocation, there will be a six months' suspension of registration as salesman; following reinstatement, Applicant shall be subject to conditions including deferment of any application for registration as a broker for two years, and then only upon conditions.

1975

COMMONWEALTH ECONOMY TOURS
LIMITED
ApplicantTORONTO
DEC. 10, 11, 12

and

REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and VIC MASI
MEMBERSCOUNSEL: RONALD P. BIDERMAN, for Applicant
VIRGINIA MACLEAN, for Respondent

DECISION : DECEMBER 12TH, 1975

REASONS: JANUARY 30TH, 1976

Applicant ("Commonwealth") was refused registration as a travel agent under The Travel Industry Act, 1974 by the Registrar thereunder on grounds that, having regard to its financial position, it could not be expected to be financially responsible in the conduct of its business and that its past conduct or that of its predecessor, a proprietorship operated by Bob Singh, indicated that its business would not be carried on with legality, integrity and honesty. The Registrar's reasons, set forth at length in his proposal, amounted to complaints of three matters - firstly, that Commonwealth was not then incorporated as indicated in its first application; secondly, that Commonwealth, or its predecessor, was apparently in breach of its financial commitment in the Passenger Sales Agreement it had entered into with the International Air Transport Association ("IATA") and thus had thereby been deprived of its power to issue air travel tickets drawn on the airline members of IATA with whom it did business, and thirdly, that there were apparently unremedied deficiencies in its method of bookkeeping and accounting, and fourthly, that Commonwealth had advertised that it had a branch office which in fact it did not have.

Evidence at the hearing indicated that a disagreement had developed in July 1975 between Commonwealth, or its predecessor, with Air India and Pan American Airlines over amounts Mr. Singh, president and the managing director, claimed to be entitled to deduct from his semi-monthly settlements with the airlines which he was obliged to transmit to New York.

(cont'd)

Having failed in his efforts to reach agreement with the airlines on the amounts, if any, that he might hold back on account of his claim by way of adjustment, he endeavoured to impose negotiations upon them by, in effect, stopping payment on cheques which were reported "n.s.f.". The plan backfired when IATA reported the default to its member airlines who promptly placed Commonwealth on a cash basis and removed all ticket stock from its office. By the time of the hearing Commonwealth had made settlement in full with all five major airline members of IATA, with whom it did substantial business aggregating approximately \$360,000. Although no airline claims remained outstanding Commonwealth could not accomplish re-instatement under the terms of IATA's standard Passenger Sales Agreement until the next meeting of the Administrative Board of IATA in February 1976.

Regarding the remaining complaints, it appeared that Commonwealth's application and incorporation were finally in order. Regarding its financial capability as a travel agency doing substantial business evidence indicated the net profit of the predecessor for the year 1974 before drawings was \$63,643 and for eight months in 1975 of \$35,586 reflecting, no doubt, the shrinkage in sales and commissions following the IATA suspension in July. The shareholders' equity stood at \$62,000. in August 1975. No evidence was offered indicating shortcomings in the bookkeeping and accounting of the Applicant except that the Registrar's inspector had concluded that the keeping of cash and account records was informal and unconventional. On the other hand, the only complaint turned up of all Commonwealth's many customers was in respect to an error in Commonwealth's office in failing to confirm a booking which had in fact been made. No member of the public had been harmed. Regarding the matter of the "branch office" the Tribunal found that the inclusion of an Ottawa telephone number in an advertisement did not constitute a representation that a branch office existed there.

ORDERED: Applicant to be granted registration subject to good behaviour on specified conditions.

CA20N
cc40
- 056

Summaries
of Decisions
Volume 5



Commercial Registration Appeal Tribunal

COMMERCIAL REGISTRATION
APPEAL TRIBUNAL

Summaries of Decisions
Volume 5



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS - VOLUME 5

(Decisions during 1976)

These are summaries of all decisions and reasons given following hearings in 1976. If reference to the full text of a decision is desired application should be made to the Tribunal's Office, Toronto, Ontario.

Published pursuant to The Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario 1970, Chapter 113.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TABLE OF CASES SUMMARIZED

APPLICANTS

	<u>Page</u>
<u>The Business Practices Act, 1974</u>	
Canadian Dominion Productions Ltd.	1
Gatti-Charles Productions Inc.	1
Rendezvous Dance Studios Ltd.	3
Rendezvous Social Club	3
 <u>The Motor Vehicle Dealers Act</u>	
Armishaw, Kenneth	7
Ciurluini, William	8
Coward, John David	11
Dabor Motors Limited	14
Dabor, Ronald W.	14
Dion Auto Sales	18
Dion, Stewart A.	18
Douglass, Ian Sholto	20
Harvan, Michael Ronald	21
Helbadjian, Haroutune	22
Horstead, Brian	25
Ken's Used Cars	7
MacMillan, Donald Neil	28
Malcolm, James Edmund	29
Martz, Ronald	31
Prendergast, James	33
Reliable Auto Sales	8
Roddy, William Robert	35
Sandy Thompson Motors	37
Sparrow, Frank W.	39
Taylor, Brian	40
Taylor, Theodore M.	41
Ted Taylor's Used Cars	41
Thompson, Robert Alexander	37
Toronto Auto Sales	28
Tysiak, Ray	22
Woods, Cyrus L.	7

APPLICANTS

The Real Estate Act

	<u>Page</u>
Kamal Pal Singh	43
Kanna Realty Limited	45
Kannegieter, Johannes B.	45
McNabb, Bruce A.	47
Meurer, Louis George	48
Polychronopoulos, Alex	49

The Travel Industry Act, 1974

Rea, Judy	52
-----------	----

TORONTO

Aug. 5
Sept. 16, 21 &
24

CANADIAN DOMINION PRODUCTIONS LTD.

MATTHEW GATTI, PATRICIA GATTI,
ALVIN CHARLES, JOHN NICHOLS AND
RONALD COLQUHOUN, andGATTI-CHARLES PRODUCTIONS INC.,
MATTHEW GATTI, ALVIN CHARLES, and

MEL STRILCHUK AND KATHI DURHAM

Applicants

and

DIRECTOR UNDER THE BUSINESS PRACTICES ACT, 1974

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR and
IRWIN CASS, Q.C., MEMBERSCOUNSEL: HOWARD E. STAATS representing all Applicants
A. N. MAJAINA for Respondent

SEPTEMBER 24TH, 1976

Applicants Canadian Dominion Productions Ltd. ("the co-producer") and its directors and officers whose names follow its name above, Gatti-Charles Productions Inc. ("the producer") and its directors and officers whose names follow its name above, and Mel Strilchuk and Kathi Durham, were the subjects of a section 7 order by the Director under The Business Practices Act, 1974 ("the Act") made on July 14, 1976 and his amending order made on August 23, 1976. The effect of such order as amended was to direct the parties so named to immediately cease and desist in certain business practices which it was alleged were unfair practices by definition in section 2 of the Act as involving false, misleading or deceptive consumer representations and unconscionable consumer representations.

The producer with head office in California and its subsidiary, the co-producer with head office in British Columbia, were, for present purposes, in the business of producing circus entertainment in Ontario under

the name Canadian International Circus. The producer entered into agreements with local municipal fire-fighting associations, police associations and social groups whereby, in return for the association's or group's sponsorship thereof, a circus entertainment of one or more days would be provided.

The producer agreed to guarantee minimum profits in proportion to the sales of tickets for circus performances. A sponsoring association would, with the assistance, and under the guidance, of the producers' local representatives Strilchuk and Durham, undertake to sell as many tickets as possible mainly through advance sales. It was alleged in the order that the sales, and especially the advance sales, of tickets were by mass telephone solicitation in the community which stressed the auspices of the local association and that the proceeds would be for the benefit of a local charitable group. The Director alleged that the guaranteed profit was small in relation to the net proceeds of the circus performances (and ipso facto, the profits retained by the producers were excessive) and correspondingly, that the ultimate benefit to the local charity, whose name was freely used in promoting ticket sales, was nominal, and examples were supplied. Objection was also taken to the manner advance tickets sales were promoted whereby local industry and businesses were canvassed to pay for special family tickets at discounted prices to be distributed by the promoters to local organizations for the use of deserving but disadvantaged families. It was alleged that the producers, always in the background during local promotions, ran the entire operations including advance ticket sales, to their considerable financial benefit. So, for example, the numbers of tickets sold vastly exceeded the performance seats possibly available.

The Applicants required a hearing pursuant to section 6 of the Act. Following three days of evidence presented by the Respondent the parties to the hearing advised the Tribunal that agreement had been reached whereby the Applicants would consent to abide by the Director's order and were in agreement with the facts as alleged against them in his order.

The Tribunal accordingly confirmed the Director's order on the basis of the admission by the Applicants that the allegations therein are correct.

ORDERED : The Director shall carry out his order.

1976

RENDEZVOUS DANCE STUDIOS LTD.
also carrying on business as
RENDEZVOUS SOCIAL CLUB,
JERRY GREENBERG AND
GISELA GREENBERG

Applicants

TORONTO

Nov. 23, 24,
25 & 26
Dec. 6 & 13

and

DIRECTOR UNDER THE BUSINESS PRACTICES ACT, 1974

Respondent

TRIBUNAL : J.C. HORWITZ, Q.C., CHAIRMAN
HELEN MORNINGSTAR and
CAMERON C. HILLMER, MEMBERS

COUNSEL : JOHN J. FREEMAN for Applicants
A.N. MAJAINA for Respondent

JANUARY 19TH, 1977

Applicants Rendezvous Dance Studios Ltd. ("the Company"), operator of a dance studio also known as Rendezvous Social Club ("the Club"), Jerry Greenberg, also known as Jerry Clyde ("Clyde") and his wife, Gisela Greenberg together with all the company's officials, employees and agents were the subject of an order made under section 6 of The Business Practices Act, 1974 ("the Act") by the Director under the Act ("the Director"). Such order made on September 9, 1976 directed compliance by the above parties and the Company's officials, employees and agents, jointly and severally, with section 3 of the Act, that is to say, to cease engaging in unfair business practices as defined in section 2 of the Act. The unfair practices alleged to be engaged in were, firstly, false, misleading and deceptive representations to patrons of the studio as to price advantages which did not exist, and representations which misrepresented the purpose or intent of a solicitation and secondly, unconscionable representations to patrons unable to protect their interests because of physical infirmity, ignorance, illiteracy or inability to understand the terms of an agreement and thirdly, unconscionable representations to patrons which are known to be excessively one-sided against the patrons, and fourthly, unconscionable representations to patrons who are thus subjected to undue pressure to enter into transactions. Particulars of the alleged misconduct were furnished in detail in the order and these consisted of complaints made known to the Director by four persons who had all been attracted to the Company's premises by advertisements either to join the Club in order to

participate in parties, dance instruction, bowling, card, dancing and night-club parties or offers of five half-hour dance lessons for \$5.00 at a discount of \$75.00. Of the customers so attracted, two were recent arrivals in Toronto and possibly unfamiliar with the English language, and one was a young man of 25 patently retarded mentally. In all cases, it was alleged, the four were eventually sold large blocks of dance lessons by the staff of the Company or Club and the "social" activities did not materialize. Confidence, once established, allegedly was followed by pressure from staff members to enter into contractual agreements with payment and lessons extending over longer periods, non-cancellable, and with penalties for non-payment.

The evidence called by the Director substantiated his allegations of unfair practices as defined in the Act. The young man, observably incapable of understanding an agreement put before him and having rather less than normal co-ordination was encouraged to enroll as a member of the Club, told he was a good dancer and eligible to win a one year "free" membership if he "passed" a test. Although earning only about \$131. net per week he was induced, over weak objections, to sign up for \$1,300. worth of lessons. Confused and worried, he revealed the situation to his father who promptly cancelled the contract and obtained refund of the moneys advanced.

Another young man of 26 seeking social contacts because of his short residence in Canada, was told he was potentially a "Full Bronze" achievement candidate and should sign up for \$1,600. worth of lessons over one year, a total of 69 hours of instruction, payable \$150. down and \$29.58 in each of 52 weeks. He signed although he endeavoured to cancel the contract 3 days later to be told he would have to pay \$500. to avoid the contract. He subsequently cancelled the contract by notice to the Company and paid no money nor did he receive any further demands.

A secretary desiring to learn dancing was attracted by an advertised offer of a trial lesson with no obligation despite which she was told she had to sign an "enrollment agreement" for \$80. less discount of \$75.00, net cost \$5.00 for five half hour lessons. A second contract for \$329.50 less a \$40. discount was followed by a third contract for \$1,357. superceding the second, and so on until she had signed eight contracts each substituting for the one before. She succeeded in cancelling the last contract during its life and was satisfied to receive a cash refund for unearned instruction by which time she had paid over \$1,159. and had received 34 and one half hours of instruction.

Evidence called by the Applicants included a satisfied client of long standing, a widow of 65 years who found the dance lessons she had received over 10 years and the fellowship and dance contests of great benefit to her. She had progressed through Bronze and Silver to the Gold Course. A dance instructor with the Company for 12 years and a North American Dance Master testified that there had been no pressure used to obtain the secretary's signature on the numerous agreements and that the introductory lessons were bona fide. He admitted each instructor would receive commissions on closing of sales of lessons. Clyde, 41, a professional dancer for 23 years, testified that he had operated the Company and Club for 15 years, that the five introductory lessons for \$5.00 was a "loss leader", that the Club was bona fide and memberships were sold only to suitable persons at \$27.00 for one year for which one was entitled to 4 dance lessons and 4 card parties. He insisted the introductory lessons ending with a test were legitimate and only interested and capable dancers were encouraged to enter into the \$329. for 30 hours or \$1,800. for 150 hour courses. Regarding the young man of 25, refund was made as soon as his incapacity was made known to Clyde who had barely met him. He denied the allegation that copies of newly signed contracts were not contemporaneously given to clients or that prospective customers were not given time to consider before entering upon contracts. He estimated the average cost of a Bronze level at from \$5,000 to \$10,000 and a Gold at between \$15,000 and \$30,000. Commissions to instructors for selling contracts was 7% of the value of the lessons sold.

In reply, an experienced dance instructor told of the sales techniques practised while he was instructing for the Company, particularly as to how a "prospect" was to be manipulated into signing up for at least an introductory course, that the Company had used some of the least principled selling tactics in the industry and that strong pressures were applied whenever possible. As for the Club's social activities, they were minimal and existed only as a "come on" to attract certain types of persons into the premises.

The Tribunal found the Director's allegations of the four unfair practices as detailed in the first paragraph above to be proved as against the Applicants or their employees and ordered them to forthwith cease and desist therefrom by practising full and proper disclosure, by amendment to the form of written

contract in use by deleting objectionable clauses, by refraining from compounding of contracts by multiple selling, by responding promptly to demands for rescission, cancellation and refunds and were ordered, for a period of 12 months, to forward details of all complaints received by them to the Director, and by correcting their advertising so as not to mislead.

ORDERED : The Director's order is sustained, varied as above mentioned.

OBP 57

KEN'S USED CARS, KENNETH ARMISHAW
and CYRUS L. WOODS
and
Applicants

TORONTO

July 6

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL : H. F. H. SEDGWICK, CHAIRMAN
IRWIN CASS, Q.C. and
JOSEPH HABERBUSCH, MEMBERS

COUNSEL: VIRGINIA MACLEAN for Respondent
APPLICANTS ARMISHAW and WOODS
in person

JULY 28TH, 1976

Proceeding under section 7 of The Motor Vehicle Dealers Act, Applicant Armishaw, a registered motor vehicle dealer and operator and owner of Ken's Used Cars, a registered motor vehicle dealership, and Applicant Woods, a registered motor vehicle salesman in the former's employ, required a hearing by way of review of the Registrar's proposal to revoke all three said registrations. The Registrar's Notice of Proposal indicated his reasons for such revocations as being the admission by Applicant Armishaw that over a period of four and a half months some 40 to 45 odometers of automobiles passing through the dealership's inventory had been turned back. The initiation of this unlawful activity apparently coincided with the employment of Woods who was hired by Armishaw to improve the profitability of the dealership. Thus the Registrar concluded that such past conduct afforded him reasonable grounds for the belief that the Applicants would not carry on business lawfully or honestly.

Evidence before the Tribunal supported the foregoing allegations and was not denied by Armishaw whose testimony was to the effect that he regretted what had happened. Woods did not offer himself as witness. The Tribunal found the Registrar's allegations and conclusions to be well founded.

ORDERED: Registrar's order to revoke altered to suspension of Applicants' registrations for one year.

1976

TORONTO

July 27, 1976

WILLIAM CIURLUINI LTD. operating
as RELIABLE AUTO SALES and
WILLIAM CIURLUINI

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
CAMERON C. HILLMER and
ROBERT S. BANNERMAN, MEMBERS

COUNSEL : S. KAZMAN for Applicants
A. N. MAJAINA and
M. VIRGINIA MACLEAN for Respondent

AUGUST 31ST, 1976

Applicant William Ciurluini Ltd., a registered motor vehicle dealer, operated under the style of Reliable Auto Sales ("Reliable") by Applicant William Ciurluini ("Ciurluini"), a registered motor vehicle salesman and sole proprietor thereof, required a hearing into the Respondent Registrar's proposal to revoke both registrations. Notice of his proposal, as amended, delivered pursuant to section 7 of The Motor Vehicle Dealers Act ("the Act") recited particulars of unusual business activity involving transactions with a motor vehicle dealer whose registrations as dealer and salesman had been suspended because of his part in such activities following investigation. Facts discovered in such investigation presumably gave rise to the Registrar's opinion that the Applicants' conduct in these matters afforded him reasonable grounds for a belief that they would not carry on business in accordance with law or with integrity and honesty and/or that they were guilty of activities which were in contravention of the Act, all as provided in section 5.

The Registrar in testimony before the Tribunal related the nature of the transactions between Ciurluini as Reliable and the suspended dealer mentioned above, one Burney, proprietor of Glen Manor Auto Sales, as revealed by such investigation. He alleged that Reliable and Burney had conspired together in the alteration of 145 automobile odometers over a period of time resulting in illegal profits to both. It was not disputed by

either Burney or Ciurluini that their respective dealerships handled 109 vehicles between March, 1975 and December 1975, Burney buying from Reliable and selling at the public auctions but after rolling back the 109 odometers a total of 2,901,861 miles and the resulting mark-up in value between Burney's cost and selling price for 43 of the vehicles was \$125. per unit and for 27 vehicles approximately \$139. per unit. During the same period Burney was actively buying used cars and selling them to Reliable who then put them into the auctions after roll-backs of odometers, for example, 34 vehicles for a total of 809,345 miles which produced a unit incremental gain of \$100. for 29 vehicles and \$80. for five vehicles. Burney himself was called and testified on Respondent's behalf, verifying the above information as to the business activity between him and Reliable and confirmed and described the rolling back procedures.

Applicants called Ronald Martz, a salesman at Reliable, who testified it was he who had made the arrangement with Burney that cars acquired by Reliable would be "sold" to Burney who would in turn arrange for the odometer roll-backs and the sale at auctions at an enhanced price and any resulting profit was to be split - \$100 to Burney, \$25. to Reliable and the balance to Martz from which he paid for the "roll-back".

A reverse arrangement for sales from Burney to Reliable with roll-backs arranged by Martz (who paid for them) was put into effect. Martz testified that Ciurluini knew nothing of these arrangements. The written records made up at the two dealerships respectively by Martz and Burney, when compared by an inspector, clearly revealed the mileage alterations and the profitability of the scheme. Martz emphatically stated Ciurluini was not involved in the "roll-backs".

Character evidence called for Ciurluini was to the effect that he had a reputation for honesty and reliability in the industry. Ciurluini, 47, married with four children, testifying on his own behalf confirmed Martz' statement that while he knew Burney, he himself had no knowledge of the above arrangements between Martz and Burney, that Reliable's business was 99% wholesale requiring two salesmen besides himself who acted chiefly as buyers, that both he and Martz bought and sold between 500 and 600 units a year and the third salesman about 100. Financial statements for the dealership showed sales in 1975 of \$2,107,017. and a net profit of \$21,716 after his own management fee of \$27,500. and commissions of \$52,461 were paid out. He categorically denied, as alleged by Burney, that he had conversations with him about "roll-backs". He had fired the other salesman over "roll-backs" but only learned at this hearing of Martz' arrangements with Burney involving "roll-backs".

In Reliable's day-to-day business each salesman did, and was responsible for, his own purchases and sales and when Ciurluini fixed his signature to transfers he did not take notice of mileages as there were too many items going through.

The Tribunal observed they accepted Burney's testimony where it was at variance with that of Martz and Ciurluini. The Tribunal found Ciurluini was, or at least ought to have been, aware of the "roll-backs" and by not verifying vehicle odometer readings he aided and abetted Martz and Burney in their scheme. The Tribunal held Ciurluini, as Reliable's only officer, was directly responsible for all its activities including Martz' independant activities. The Tribunal observed that ultimate purchasers of vehicles with understated mileage were defrauded. In the result, the conduct of Ciurluini, in both capacities, was such as to justify the belief that he would not carry on business in accordance with law and with integrity and honesty but, in view of his previous record, he should only have to suffer suspension of registration for one month and thereafter he should be registered upon conditions of good behaviour and Reliable should be subject to inspection by the Registrar or his staff at reasonable times without the necessity of his having received a complaint as provided in section 22 of the Act. Neither shall Martz or Burney be employed by it.

ORDERED : Suspension of dealer and salesman registrations for one month instead of revocation asked for; registration, when restored, upon terms.

JOHN DAVID COWARD

TORONTO

Applicant

Oct. 5

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and
A. D. SISLEY, MEMBERS

COUNSEL: ALLAN M. HUYCKE for Applicant
M. VIRGINIA MACLEAN for Respondent

OCTOBER 29TH, 1976

Applicant required a hearing by way of appeal under section 6 and 7 of The Motor Vehicle Dealers Act ("the Act") from the Respondent Registrar's refusal to grant him registration as a salesman of motor vehicles. Notice of such refusal was duly given in writing by the Registrar on August 24, 1976 without reasons other than by reference to his earlier notice of proposed refusal dated June 9, 1976 given with reasons, essentially, that Applicant had been actively engaged for a considerable period in the business of buying and selling motor vehicles while unregistered as a motor vehicle dealer. Incidentally, the Registrar's proposal of June 9th denied Applicant registration as a motor vehicle dealer for the same reason and he based both refusals on his reasonable grounds for belief that Applicant would not carry on business in accordance with law and with integrity and honesty as required by section 5 (b) of the Act. In his second refusal of salesman registration, now appealed from, the Registrar relied on section 21 of the Act which expressly permits an unsuccessful applicant for registration to make further application based on "new or other evidence or where it is clear that material circumstances have changed". Being unable to find such new or other evidence or materially changed circumstances, the Registrar accordingly again refused registration. It was for the Tribunal therefore to decide whether the requirements of section 21 had been met and thus found it necessary to review the circumstances of the earlier refusal.

Applicant, 22, married with three dependants, following an investigation by the Ontario Provincial Police, admitted his involvement in the sale of 14 motor vehicles which he purchased "as is" or "unfit" except for 3 for which safety certificates were issued. Only two of these vehicles were apparently bought by Applicant for his own use and the remainder were sold to customers of the motor vehicle dealer from which he had purchased them. The dealer was thus guilty of employing an unregistered salesman and endeavoured to cover up the situation by alterations to the bills of sale to indicate that Applicant purchased each vehicle for the customer and another salesman's name was entered in the appropriate space. With the dealer's co-operation information of the foregoing came to the Registrar's attention who thereupon placed the dealer's registration on terms and conditions. For Applicant's part in the scheme, as well as being denied registration as dealer and salesman, he was prosecuted and convicted of an offence under section 9 (2) of the Highway Traffic Act for failing to notify the registering authority of the transfer through sale of a motor vehicle. Evidence before the Tribunal indicated the Applicant had personally offered motor vehicles for sale by advertisement over a period of four months.

Applicant sought to explain his conduct through ignorance of the provisions of the Act, that he had dealt fairly with the purchasers of automobiles which were mechanically fit and there had been only one complaint which he was able to satisfy, that he had been misinformed by a friend as to his right to re-apply for registration in two months. He admitted there had been an evasion of Provincial retail sales tax by his customers on the differential between his cost of vehicles from the dealer and the purchase price. He confessed having received unemployment insurance benefits while working at the dealership which he now intended to report to the Commission.

The Tribunal found Applicant had carried on business as a dealer while unregistered, contrary to section 3 (1) of the Act; that there had been less than full disclosure of his activities in his applications for registration; that he had contravened section 9 (2) of the Highway Traffic Act; that he had driven or permitted the driving of mechanically unfit automobiles. In the result, the Tribunal came to the conclusion that, although Applicant had not carried on business in accordance with law and with integrity and honesty, he had been the victim of his employer's laxness and, chastened by experience, should be permitted to earn a livelihood under proper safeguards. The Tribunal was prepared to grant him registration as a salesman under conditions to be imposed for a two-year period.

ORDERED: Registration as salesman to be issued subject to terms and conditional on good behaviour and that the employing dealer, who is to be approved by the Registrar, must have a full-time Sales Manager and the Applicant may only sell vehicles from such dealer's inventory under the sole direction of such Sales Manager; the Applicant is to inform the Registrar within two months hereafter that he has informed himself concerning, and understands, The Motor Vehicle Dealers Act.

DABOR MOTORS LIMITED, carrying on
business as CHURCH MOTORS and
RONALD W. DABOR
Applicants

TORONTO
Mar. 23-
Apr. 20-
June 7 &

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
C. C. HILLMER and
F. D. PROUSE, MEMBERS

COUNSEL: M. VIRGINIA MACLEAN and
A. N. MAJAINA for Respondent
APPLICANT - in person

AUGUST 9TH, 1976

Dabor Motors Limited ("Dabor Motors"), a registered dealer under The Motor Vehicle Dealers Act ("the Act"), operated Church Motors, a sizeable franchised dealership in Toronto. Ronald Dabor ("Dabor") a registered salesman under the Act, was the president and moving spirit of Dabor Motors. A hearing was required by notice of both registrants pursuant to section 7 (2) of the Act in respect of a proposal by the Respondent Registrar ("the Registrar") made on May 9, 1974 to suspend the aforementioned registrations for a period of three months for reasons set forth at length and in considerable detail reciting events and transactions between Dabor or members of the staff of Church Motors, on the one hand, and the Registrar or members of his staff, on the other hand. The Registrar alleged infractions of the Act and of the former Used Car Dealers Act from 1965 in the matter of the hiring of unregistered salesmen and in failing to notify changes in the hiring and termination of employee salesmen, contrary to sections 28 and 4 of the Act. The Registrar further alleged failures by the registrants to observe the requirements of section 22 in dealing in the prescribed manner with numerous customer complaints extending over four years commencing in 1970. It was further alleged that the dealership was guilty of infractions of the Regulations under the Act respecting correct completion of sales agreements and financing documents and, incidentally, in failing to return moneys and ownership registration documents deposited by

customers where transactions were not completed. Unheeded warnings regarding objectionable advertising had resulted in cease and desist orders under section 30 of the Act. Finally the Registrar complained that there was a lack of co-operation in observance of the letter, if not the substance, of the law in the matter of responses to requests for information under section 22 and obstruction to inspectors lawfully at the dealer's premises. In sum, the Registrar founded his proposal on section 5 (c) of the Act citing the foregoing as basis for his belief that such past conduct on the part of Dabor as an officer and director of Dabor Motors and as salesman that the registrants would not carry on business in accordance with law and with integrity and honesty, contrary respectively to section 5 (1) (c) (ii) and section 5 (1) (b) of the Act.

Dabor, personally representing both Applicants, made a preliminary motion that the Tribunal rather than proceed with a hearing should dispose of the matter without a hearing on the grounds that the Respondent Registrar had failed to supply the Applicants with reasonable information before the hearing commenced concerning the lack of propriety in their conduct as contemplated by section 8 of The Statutory Powers Procedure Act, 1971, and that Applicants had not been 'afforded an opportunity to examine before the hearing any written and documentary evidence that will be produced or any report the contents of which will be given in evidence at the hearing" as provided in section 9 (a) (3) (b) of The Ministry of Consumer and Commercial Relations Act. Such motion was dismissed by the Tribunal following admissions by a witness for the Applicants that she had received or had the opportunity to view substantially all files mentioned in Respondent's proposal. The Tribunal made a finding following the conclusion of the entire hearing that the above procedural requirements, in so far as the Respondent was concerned, had been satisfied. The lengthy (13 page) and detailed proposal of the Registrar contained allegations of the following breaches of the Act :

1. Section 28 - Employing unregistered salesmen and failing to notify engagements and terminations of employment

Following passage of the Used Car Dealers Act of 1964 the Respondent had occasion to complain on frequent occasions between 1965 and 1970 which resulted in warnings and two reprimands. The Tribunal's finding was the Respondent should not have resurrected these matters in 1974 and in any case the dealer had, in part, been a victim of unscrupulous salesmen.

2. Section 22 subsection (1) Registrar's inquiries regarding customer complaints

The Registrar listed 132 consumer complaints received between 1965 and 1973 and, while admitting that at least 27 of these were found to be unjustified, lead evidence as to five of such complaints which had occupied much heated correspondence between the Registrar and Dabor. Of these the Tribunal found two to have been eventually resolved, one was unjustified and the remaining two indicated unsatisfactory conduct on Applicant's part. It was apparent however that Applicants were at fault within the purview of section 22 in evasive and delaying responses.

3. sections 16 & 17 - Ontario Regulation 98/71 stipulating information to be disclosed to customers in purchase orders and financing instruments.

Five instances were evidenced, four of which Tribunal found to be in breach and one was trifling; communications however between the Registrar's office and the Applicants concerning these complaints were invariably drawn out indicating the latters' intention to wear down the former's patience.

4. Generally, that Applicants took advantage of customers who lacked facility in English and education in commercial practice

Specifically in exerting undue pressure upon such to enter into contracts and refusing to return deposits, trade-ins and title documents. Five examples were cited of which one only was found to be sustained and consequently, on all the evidence, that the general allegation was unproven.

5. section 30 - Making false, misleading or deceptive statements in advertising, circulars etc.

These complaints produced warnings from respondent to Applicants numbering 15 between 1965 and 1972 giving rise to animosity, vitriolic exchanges and letters to newspaper consumer columnists. A cease and desist order was issued in 1971. The Tribunal found such warnings and cease and desist order justified and throughout a recurring lack of co-operative response to inquiries and in settling complaints was evident.

6. section 22 subsection (2) and (3)

Dabor had genuine and determined objection to Respondent's manner of designating inspectors and of specifying the information sought and details of related complaints. Authority is given to the Registrar, or to persons designated by him in writing, to inspect and Dabor repeatedly refused entry or inspection to authorized holders of plastic identification cards. Dabor also insisted that each inspection under the section must be related to a specific complaint and that 'fishing expeditions' were unwarranted. The Tribunal would approve the practice of using identification cards provided that each inspection clearly be related to specific complaints. The Tribunal found Dabor obstructed the inspectors without authority and repeatedly failed to co-operate in supplying information. A fundamental difference of opinion between Dabor and the Registrar over Dabor's methods of dealing with customer complaints was apparent resulting in charges and counter-charges of bad faith on both sides. Dabor claimed he was the object of threats. After receiving voluminous correspondence between the parties and considerable testimony on the subject the Tribunal found that the Registrar had properly discharged his duties under the Act and that there was wilful obstruction by Dabor.

The general findings of the Tribunal were that Dabor had behaved contemptuously towards the Registrar and his staff in a way designed to bring ridicule and discredit upon them and such conduct provided reasonable and probable grounds for a belief that Applicants would not carry on business in accordance with law and with integrity. However there being not the slightest hint of dishonest conduct of business with customers that a lengthy suspension was not called for.

ORDERED: Suspension of both registrations for one month and thereafter, for eleven months, subject to terms and conditions and to their good behaviour.

ST. CATHARINES

DION AUTO SALES and
STEWART A. DION

Aug. 6

Applicants
and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL : J.C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
B.G. JANTZI, MEMBERSCOUNSEL: M. VIRGINIA MACLEAN for Respondent
APPLICANT - in person

AUGUST 31ST, 1976

Applicant Stewart A. Dion ("Dion") having applied for registration as a motor vehicle dealer under the name Dion Auto Sales and as salesman therefor, was refused in both applications by the Acting Registrar. Notice of the proposal to refuse recited a series of convictions recorded against Dion in May, 1976 which past conduct, it was claimed, afforded reasonable grounds for a belief that the Applicants would not carry on business in accordance with law and with integrity and honesty (section 5 (1) (b) of The Motor Vehicle Dealers Act). The admitted convictions and sentences consisted of:

- a) under section 33 of The Motor Vehicle Dealers Act - furnishing false information in applications and returns : nine charges - fine of \$500. or 30 days for five, and suspended sentence on four
- b) under section 33 (1) (a) - as above: one charge - fine of \$200., or 10 days
- c) under section 58 of the Highway Traffic Act - failure to provide safety standard certificate : three charges - fine of \$300., or 30 days.

- d) under section 7 (1) of the Highway Traffic Act - delivering a false statement required under the Act: four charges - fine of \$300., or 20 days
- e) under section 36 (1) of the Highway Traffic Act - failure to keep records of vehicles bought and sold: one charge - fine of \$50., or 5 days
- f) under section 35 (1) of the Highway Traffic Act - dealing in motor vehicles without being licensed as to premises: one charge - fine of \$100., or 10 days.

It was also alleged Dion had admitted carrying on business as a dealer in motor vehicles without registration and to a conviction for illegally tampering with odometers.

Applicant, 35 and married, admitting the foregoing, endeavoured to justify a grant of registration in that he had paid fines totalling \$1,450., that he had put himself through college with his earnings, that he had ceased dealing in automobiles and odometer tampering when notified of the illegality of such practices, and that he was determined to rehabilitate himself.

The Tribunal concluded Dion was unfit to be a dealer or salesman in that he had defrauded the public through rolling back odometers, that his conduct in making false statements regarding the existence of insurance on vehicles he sold was potentially harmful to the public and that he must be taken to have known of the illegality of the conduct for which he was convicted. Applicant could not be expected therefore to be sufficiently financially responsible to operate a dealership and that there were reasonable grounds to conclude that he would not carry on business within the law or with integrity and honesty.

ORDERED: Refusal to register as dealer and salesman is confirmed.

IAN SHOLTO DOUGLASS

Applicant

TORONTO

Apr. 30

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL : J. C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN MORNINGSTAR
HERBERT A. KEARNEY, MEMBERS

COUNSEL: J. E. CLEMENT, Q.C., for Applicant
WILSON LEE and A. N. MAJAINA for Respondent

MAY 10TH, 1976

Applicant, having notice of the Respondent Registrar's proposal to suspend his registration as a motor vehicle salesman for a period of one month, required a hearing pursuant to sections 6 and 7 of The Motor Vehicle Dealers Act ("the Act"). The Registrar's reasons, fully stated in his proposal, were that Applicant had on two occasions in 1974 filed false affidavits in support of two applications for salesman registration denying the existence of pending criminal charges against him and again in 1976 in support of his application for renewal of registration he had falsely sworn by affidavit that he had not been convicted of a criminal charge. The Registrar found this conduct of Applicant afforded grounds for a belief that he would not carry on business within the law and with integrity and honesty.

Applicant, 36, married with a dependant, was prepared to admit three convictions for minor offences but it was claimed he had misunderstood the questions as put in the forms he had furnished. In Applicant's behalf it was agreed he would accept a month's suspension if it could be served in the month of July instead of April.

ORDERED: Tribunal confirms Registrar's proposed suspension for one month, varied as to period to be served.

MICHAEL RONALD HARVAN

TORONTO

Oct. 12

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL : J.C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and
MILTON PATTERSON, MEMBERS

COUNSEL : APPLICANT - in person
RESPONDENT - in person

OCTOBER 12TH, 1976

Applicant required a hearing by way of an appeal under sections 6 and 7 of The Motor Vehicle Dealers Act ("the Act") from the refusal of the Registrar of Motor Vehicle Dealers and Salesmen ("the Registrar") to grant him registration as a salesman of motor vehicles. Notice of such refusal was from the Acting Registrar on September 15, 1976 given without reasons other than by reference to his earlier notice of proposed refusal dated August 13, 1973 given with reasons, essentially, that Applicant had refused the Registrar's offer of conditional registration on terms and conditions applicable to both Applicant and his sponsoring dealer which apparently they found unacceptable as unduly onerous. In his second refusal, now appealed from, the Acting Registrar relied on section 21 of the Act which expressly permits an unsuccessful applicant for registration to make further application based on "new or other evidence or where it is clear that material circumstances have changed". The Acting Registrar being unable to find such new or other evidence or materially changed circumstances to justify his granting registration, accordingly refused the second application. It was for the Tribunal therefore to decide whether the requirements of section 21 had been met and thus found it necessary to review the circumstances of the earlier refusal.

The Tribunal found no new or other evidence or material change in the Applicant's circumstances as would justify the grant of the registration sought.

ORDERED : The refusal of grant of registration is confirmed.

RAY TYSIAK and HAROUTUNE HELBADJIAN

Sept. 10 & 11

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL : J.C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS and
ROBERT J. RUMBLE, MEMBERS

COUNSEL : I.W. BARDYN for Applicants
M. VIRGINIA MACLEAN for Respondent

OCTOBER 18TH, 1976

By notices of proposal dated May 18th and amending notice dated July 23rd, 1976 to the Applicants Tysiak ("T") and Helbadjian ("H"), the Respondent ("Registrar") proposed to revoke their registrations as motor vehicle salesmen for stated reasons, in substance, 1) that they lacked financial responsibility in that the motor vehicle dealership, in which they had admittedly substantial investment and had managed, had become bankrupt in early May, 1976; 2) that the issuer of the bond of guarantee deposited by the dealership had given notice of cancellation of the bond effective June 30, 1976; 3) that they had conducted purchases and sales of motor vehicles after the declaration of bankruptcy of their dealership when it ceased to be qualified to carry on business; 4) that they had conducted the financial affairs of the corporate dealership in an unusual fashion so as to give rise to questions concerning the disposition of a substantial investment therein by one Alexander Skoken ("S"); 5) that in the course of operating their dealership they had failed to maintain, and observe the rules for operation of, a trust account for funds received as dealer on account of undelivered vehicles, contrary to paragraph 20 of Regulation 98/71 under The Motor Vehicle Dealers Act ("the Act").

The Registrar relied on the foregoing grounds for his belief that the past conduct of the Applicants as officers and directors of the corporate dealer was such as to indicate they would not carry on business in accordance with law, integrity and honesty. Applicants required a

hearing to review the Registrar's proposed revocations of their motor vehicle salesmen registrations pursuant to section 7 of the Act. Counsel for Applicants admitted the Registrar's allegations numbered 1, 2 and 3 above at the outset of the hearing.

It appeared that T, H. and S. had entered into partnership, formalized by written agreement made on August 29, 1975 evidencing equal contribution and participation. In November 1975 a corporation was formed to operate the dealership its three officers being the Applicants and S. Notice was received in April 1976 by the Registrar from the issuer of the corporation's guarantee bond that it would be cancelled on June 30, 1976. On May 3, 1976 the corporation made an assignment in bankruptcy and its registration as motor vehicle dealer was revoked effective July 1st.

The corporation had commenced business as of August 31, 1975 and, according to a pro forma balance sheet at such date, it then had a stated equity of \$309,647 due to its three shareholders, the Applicants and S., so it is presumed, approximately equally to each. S. thereupon became an ordinary employee and although he was Treasurer of the company, he accepted subordination to his two partners who operated the dealership. S. came to the company's rescue in February 1976 with a loan of \$10,000 which was to be promptly repaid and when overdue he forced a meeting at the end of March with his two partners which was so unsatisfactory from his point of view that he resigned and left with five automobiles. S. admitted while testifying that he had borrowed the \$10,000 with T. co-signing as well as S's son. Testimony of a representative of the Trustee in Bankruptcy of the company indicated the fiscal records of the company were lacking, that there was an apparent cash deficit of \$143,461 for the eight months of operation (apart from the land and buildings) and the loss could not be accounted for otherwise than unrecorded sales or uncollected revenue. He found no evidence of misapplication or misappropriation of funds.

T.'s testimony was that in 1974 he and H. joined as partners with a group that had purchased a dealership, both of them contributing \$30,000 cash. Shortly thereafter, upon learning that the group had taken out \$100,000 from the business without disclosure to them they moved to save their investment by buying out the group's interest for a further \$30,000 cash, two automobiles worth \$10,000 and the giving back of a second mortgage for \$40,000 on the dealership's real estate, and by assumption of the dealership's obligations. T. and H. later found it necessary to contribute between \$60,000 and \$70,000 more to the business. When S. approached them with a view to investing in the corporation he was given all financial information and permitted to see the books and operations over a span of

two months before he first loaned the corporation \$30,000, and finally, for a one-third interest, paid in \$100,000. S. went on salary of \$450. per week, had the personal use of cars and his son was employed. By February 1976 it was apparent the business was doing badly and the three partners' salaries were cut to \$300. per week and S. advanced the loan of \$10,000 above referred to and to secure it, a deed of a house property belonging to the corporation was made to S's son. Referring to the removal of cars by S., T. said he had taken seven including one which had already been sold (which he returned against payment of \$1,800.), whereupon T. fired S. T. recounted how a fire at the dealership in March 1976 had destroyed \$25,000 worth of spare parts and repairs which loss was however insured and the proceeds were taken by the corporation's bankers to reduce its loan. T. denied receiving any personal benefit arising from S's investment saying that there had been no misappropriation of funds and that he had personally lost more than S. through the bankruptcy. He admitted causing the dealership to operate for over a month without registration and to using a fictional partnership in April 1976 to carry through a substantial sale without first obtaining dealer registration under the Act. He further admitted a shortage had developed in the dealership trust account in the last month of operation but that no customer had suffered a loss. H's evidence corroborated that of T.

The Tribunal concluded S. had sufficient business acumen and experience and an opportunity to understand what he was doing in investing in the partnership and dealership and that he had not been deceived nor had T. or H. personally benefited from S's financial intervention. The Tribunal further found there had been breaches of the Act, namely, section 3 (1) (a) - (carrying on business of dealer without registration) and 3 (3) - (carrying on the business of dealer in a name other than the registered name) and of Regulation 20 under the Act - (failing to operate and maintain a trust account) and that, as directors of the corporation, Applicants had not maintained proper records. However such past conduct, without more, did not seem to the Tribunal to warrant the revocations of salesman registration as proposed provided appropriate conditions are imposed.

ORDERED: Applicants' registrations as salesmen to be continued, conditionally for one year on good behaviour, and employment shall be with a dealer having Registrar's approval and during such period Applicants shall not apply for dealer registration.

1976

WINDSOR

BRIAN HORSTEAD

Oct. 13

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and
MILTON PATTERSON, MEMBERS

COUNSEL: RICHARD GATES for Applicant
RESPONDENT, R.G. MACCORMAC in Person

NOVEMBER 3RD, 1976

Applicant required a hearing into the Registrar's refusal to grant him registration as a salesman of motor vehicles under The Motor Vehicle Dealers Act ("the Act") which provides in section 5 (1), that individuals are entitled to registration except where there exists a lack of financial responsibility or past conduct indicating a tendency not to carry on business legally and with integrity and honesty. The single ground for refusal, as stated in the Registrar's proposal, was Applicant's intention to continue his principal occupation as a firefighter with the Windsor Fire Department. The Registrar relied on the requirement of integrity, construing it as inconsistent with a part-time employment or, conversely, that a person otherwise employed full-time (fireman) would lack integrity in another chosen occupation (motor vehicle salesman) at which he could only work part time. The Registrar, while freely admitting Applicant was otherwise qualified, asserted he was bound to construe the Act as though its purpose and scheme of regulation of the industry, were to raise the standards of such industry and therefore, to allow persons to become salesmen as secondary careers, would tend to lower standards in the industry.

Evidence led by the Registrar indicated firemen in the Windsor area who worked part-time in construction had created problems in the view of the employers and the construction unions which they both wished to end. The president of the local automobile dealers association represented that the majority of dealers were opposed to part-time salesmen as lacking professionalism and industry pride, that the public would receive inferior service from them, that they would expose employing dealers to risks through misrepresentations and, finally, that dealers prefer steady staffs.

He added that to employ part-time salesmen would be unfair to full time salesmen. Under cross examination the last witness modified his stand, admitting that part-time salesmen could with diligence become proficient and carry out their responsibilities.

The Windsor Deputy Fire Chief, on Applicant's behalf, testified that of the force of 284 employees about 50 have part-time jobs and the Department policy permits the practice. As for the Applicant, who had been with the Department for 12 years, he had a satisfactory record. Witness admitted all off-duty firemen would be called to duty in the event of a disaster or holocaust but each had the right to refuse. The Windsor Department has no part-time firefighters although other municipal fire departments do.

Applicant's would-be employer was a dealer in recreational vehicles including both self-propelled vehicles and trailers and conversion equipment. Sales were, by percentages, in motorized units - 27%, having a dollar value of approximately 48% of the totals. Applicant had been putting in about 50 hours a week selling only non-motorized units. Applicant worked only two consecutive 24-hour shifts at the Fire Department and therefore had at least 4 days available weekly for part-time employment.

Applicant, 34, married with two dependants, wished to assist his employer, an old friend, by qualifying himself to sell all classes of recreational units without restriction but that the earnings therefrom would scarcely attract a full-time salesman even if his employer could afford to hire one which was doubtful. In fact, to his knowledge, no one had applied for the job other than himself. Applicant had also worked as a part-time salesman, as a truck driver, and in construction.

The Respondent urged upon the Tribunal that it ought to refuse the requested registration in the public interest. Such employees would be unskilled in a technical business especially in assessing trade-in vehicles offered in part payment of recreational units. Moreover he wondered how it would be possible to discipline a part-time salesman. The employment of part-time help would harm the industry and particularly the full-time salesmen. He argued that the Tribunal had the power to determine policy. He quoted authorities including the legislature debates.

Applicant's counsel argued against the use of parliamentary debates in interpreting the resulting legislation (A-G v Readers' Digest (1961) SCR 775). He found Respondent's reliance on the word 'integrity' inconsistent with its true meaning. The Tribunal may not decide policy (Kendrick v Milk Board of Ontario (1935) OR 308 and Brampton Jersey Enterprises Ltd. v Milk Control Board of Ontario (1956) OR 1).

The Tribunal found Applicant met all requirements of the Act, and there is no evidence, reason or law to exercise a discretion in preventing a grant of registration. The Act however authorizes the Tribunal to apply terms and conditions.

ORDERED : Registrar shall register Applicant as salesman under the Act restricting his employment to the presently nominated employer.

TORONTO AUTO SALES
operated by
DON MACMILLAN LTD. and
DONALD NEIL MACMILLAN

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and
JOSEPH HABERBUSCH, MEMBERS

COUNSEL : MICHAEL T. WADSWORTH for Applicant
A. N. MAJAINA for Respondent

DECEMBER 6TH, 1976

Applicants, Toronto Auto Sales, a registered motor vehicle dealer, and MacMillan, the proprietor and operator thereof through his control of Don MacMillan Ltd. and a registered salesman of motor vehicles, required a hearing pursuant to section 7 of The Motor Vehicle Dealers Act ("the Act") by way of review of Respondent Registrar's proposal to revoke their registrations duly notified to them with stated reasons.

At the delayed opening of the hearing, Applicants through counsel admitted the allegations contained in the Registrar's reasons for his proposal. The Tribunal was urged by counsel for all parties to consider imposing suspensions of Applicants' registrations for ten months instead of revocations as sought if the Tribunal was satisfied with the terms of an agreement to be formally entered into and filed with the Tribunal within a specified period. It was proposed the Tribunal would, if satisfied with such agreement, make its order accordingly pursuant to section 4 (b) and (c) of The Statutory Powers Procedure Act, 1971. The Tribunal upon consideration agreed to so proceed.

ORDERED: Applicants' registrations to be suspended for ten months commencing January 1, 1977 provided there is due compliance with and observance of the terms of a consent order dated November 24, 1976, filed, before and after January 1, 1977, the date of suspension, and October 31, 1977, the date when MacMillan may apply for reinstatement as dealer and/or salesman.

JAMES EDMUND MALCOLM

TORONTO

Applicant

Nov. 19

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C. and
J. TIM HOGAN, MEMBERS

COUNSEL: A.N. MAJAINA for Respondent
APPLICANT in person

DECEMBER 6TH, 1976

Applicant, a registered motor vehicle salesman, following receipt of notice of the Registrar's proposal to revoke his registration given pursuant to section 6 of The Motor Vehicle Dealers Act ("the Act") duly required a hearing in accordance with section 7 of the Act. The Registrar's said notice supplied full particulars in support of the proposed revocation which, briefly stated, alleged that Applicant had carried on the business of a dealer in motor vehicles while not so registered, had evaded payment of Ontario Sales Tax in an irregular transaction involving a used motor vehicle by failing to transfer the ownership to himself as required by the Highway Traffic Act before re-selling such vehicle and, incidentally, after causing the odometer thereof to be rolled-back some 30,000 miles. Based on these grounds the Registrar found reasonable grounds for his belief that Applicant would not carry on business in accordance with law and with integrity and honesty.

Applicant did not appear within 45 minutes of the time appointed for commencement of the hearing arranged at his behest although proof was made of due service of the Tribunal's notice of hearing by registered and ordinary mail as prescribed by section 31 of the Act and that such notice contained the advice that, where due notice has been given of the proceeding to a party and such party does not attend, the Tribunal may proceed in his absence and without further notice to him.

Evidence given under oath indicated Applicant had first been registered as a salesman of motor vehicles in 1965, had transferred dealers in early May, 1975 had terminated with such dealer in May, 1976, and finally transferring again effective mid-July, 1976.

The Applicant's activities complained of by the Registrar as above stated apparently were carried out during June while he was ostensibly inactive as having no dealer affiliation as indicated above. The allegations made by the Registrar in his proposal were proved and Tribunal accordingly found Applicant had carried on the business of a dealer contrary to the Act; had caused the rolling-back of an odometer contrary to the Act; had failed to effect transfer of a vehicle purchased by him, contrary to the Highway Traffic Act, and had converted to his own use retail sales tax due to the Province of Ontario by signing, without authority, the name of his former dealer to a transfer declaration and application for transfer. Tribunal held the Registrar was justified in finding reasonable grounds for revocation.

ORDERED: The Registrar will carry out his proposal to revoke Applicant's salesman registration.

RONALD MARTZ

Applicant

Oct. 29

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: HUGH SEIDGWICK, VICE CHAIRMAN, AS CHAIRMAN
W. W. EVANS, C.A. and
Wm. J. SHANAHAN, MEMBERS

COUNSEL: JAMES L. NEWMAN for Applicant
M. VIRGINIA MACLEAN for Respondent

DECEMBER 8TH, 1976

Applicant, a registered motor vehicle salesman, on receiving notice from Respondent Registrar of a proposal to revoke his registration under The Motor Vehicle Dealers Act ("the Act") duly required a hearing into such proposal pursuant to section 7 of the Act. The Registrar based his proposal upon evidence that Applicant, while an employee of one Burney then operating a Toronto motor vehicle dealership, had played a part, at least to the extent of procuring the services of an instrument mechanic, in a wholesale rolling-back of odometers of motor vehicles. Burney, for his part in such odometer tampering scheme, suffered an 18 month suspension of his dealer registration and a three month suspension of his salesman registration which apparently was not contested. Applicant was currently employed by another party to the scheme, one Ciurluini, who for his part therein and for other reasons has also been the subject of proposals by the Registrar to revoke his registrations as dealer and salesman which however were contested by Ciurluini before this Tribunal (see Wm. Ciurluini Ltd. and Wm. Ciurluini and Registrar of Motor Vehicle Dealers and Salesmen, page 8 of this Volume of Summaries of Decisions) with the result that both Ciurluini registrations were suspended by the Tribunal for one month and, upon resumption, to be upon conditions to apply for 11 months, one of such conditions being that Ciurluini, as dealer, must not employ said Burney or the present Applicant. Respondent further alleged admissions by Applicant freely made to him after first being cautioned confirming his involvement in odometer tampering while in Ciurluini's employ. The Registrar also accused Applicant of carrying on as a dealer without holding registration as such.

Evidence before the Tribunal supported the Registrar's allegations of odometer tampering as against the present Applicant acting in concert with Burney. It also appeared Applicant, who had been under employment by Ciurluini since the beginning of 1973, received notice of termination effective on the day of this hearing.

Tribunal found the Registrar was justified in the belief that there were reasonable and probable grounds for the belief that, based upon his past conduct, Applicant would not carry on business in accordance with law, integrity and honesty. However the Tribunal found no reason to distinguish Applicant's situation from that of Burney qua salesman and accordingly would apply suspension rather than revocation.

ORDERED: Registrar will suspend Applicant's registration for four months and, upon re-instatement, to be continued during good behaviour.

1976

JAMES PRENDERGAST

TORONTO

Applicant

Mar. 31

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL : J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and
MURRAY FELDMAN, MEMBERS

COUNSEL : MILTON J. BERNSTEIN for Applicant
A.N. MAJAINA for Respondent

APRIL 2ND, 1976

Applicant, a registered motor vehicle salesman, proceeding under section 7 of The Motor Vehicle Dealers Act, required a hearing by the Tribunal to review the proposal of the Registrar (Respondent) wherein he would suspend Applicant's registration for three months. The Registrar furnished reasons in support of his proposal, firstly, that Applicant had admitted to failing to account to his employing automobile dealer, and that he had converted to his own use, sums amounting to approximately \$2,000. received by him from his employer's customers; secondly, that Applicant's financial situation was precarious. On these grounds the Respondent concluded that Applicant's past conduct precluded a belief that he would carry on business within the law and with integrity and honesty.

The evidence was that the Applicant, aged 34, an emigre from Ireland had dealt in automobiles before coming to Canada in 1973. Having obtained registration within a few months of taking up residence in the Toronto area he became employed as a salesman, most recently with a franchised dealer. After six month's employment he left on a two month vacation to Ireland leaving behind a number of unexplained deficiencies in four automobile transactions at such dealership. Following discovery in November 1975 of the defalcations which could be traced to him, and in his continued absence, his employment with the dealer was terminated on December 1, 1975.

Shortly thereafter Applicant returned, admitted he had "borrowed" the money and on the strength of his undertaking to repay the debt through commissions as earned, was re-hired. Such arrangement was short-lived and Applicant was finally dismissed in January 1976 while still owing his employer \$1,697. of the moneys so converted. In Applicant's favour it must be said that his employer's method of bookkeeping and accounting for deposits from customers was haphazard resulting in cheques being held for long periods, receipts for payments frequently not being issued to purchasers until after the automobiles had been delivered.

The Tribunal found Applicant had converted \$1,767. to his own use, repaying only \$70. and that his conduct was such as to justify the Registrar in proposing suspension.

ORDERED- Applicant's registration will be suspended for three months in any event and for such further period until he repays in full moneys due to his former employer, and his registration shall then be upon conditions.

1976

WILLIAM ROBERT RODDY

TORONTO

Applicant

Apr. 9

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL : H.F.H. SEDGWICK, VICE CHAIRMAN AS CHAIRMAN
HELEN J. MORNINGSTAR and
ROBERT H. FOSTER, MEMBERS

COUNSEL: DOUGLAS E. ROLLO, Q.C., for Applicant
A.N. MAJAINA for Respondent

MAY 17TH, 1976

Applicant required a hearing into Respondent Registrar's refusal to grant him registration as a motor vehicle salesman as the Registrar had been directed to do by a recent order of the Tribunal following a hearing. (Summary of Decisions Vol. 4 p. 12). The Tribunal order of December 31, 1975 so directing the Registrar included the following further direction:

"That William Robert Roddy's registration shall be restricted to employment only with a motor vehicle dealer, approved by the Registrar of Motor Vehicle Dealers and Salesmen and that no transfer of employment or registration shall be undertaken by William Robert Roddy without prior notice in writing to and with the approval of the Registrar, whose approval shall not be unreasonably withheld".

The Registrar, when applied to by Applicant, delivered a notice proposing to refuse the application for fully stated reasons which, briefly stated, were that the dealership with which Applicant sought to be employed, and its proprietor, one McQuade, were not such as would exert the degree of control and supervision which the Tribunal must be presumed to have had in mind when it made its order, qualified as above stated. There followed a catalogue of alleged misbehaviour on McQuade's part over an extended period including suspension for operating a used car business from a private residence instead of from an approved location contrary to Regulation 3/65 under The Used Car Dealers Act, conviction in 1973 for issuing a false certificate of mechanical fitness, and his openly voiced criticism of the legislative regulation

of the motor vehicle industry. The sole question for the Tribunal to decide was whether the Registrar's proposal and the exercise of his discretion in making it were within the scope and intent of the Tribunal's order of December 31, 1975 and both parties agreed it was within the jurisdiction of the Tribunal to decide the question.

Evidence produced by the Registrar established the above allegations and that a former dealership of McQuade's had been twice cautioned by the Registrar for infractions of The Motor Vehicle Dealers Act namely, for employing an unregistered salesman and for failing to notify the Registrar of the termination of a salesman. The Registrar further alleged the existence of evidence that the proprietor had been receiving the services at two of his dealerships of a well-known odometer roll-back operator.

The Tribunal found all of the Registrar's allegations against McQuade to have been proved excepting in regard to his repeated criticism of the Government's legislative program of regulation of the motor vehicle industry which the Tribunal pointedly disregarded. In the result the Tribunal found the Registrar had not acted unreasonably in refusing to register Applicant to the dealership of which McQuade was proprietor.

ORDERED : Registrar's refusal to register is confirmed.

1976

ROBERT ALEXANDER THOMPSON
operating as
SANDY THOMPSON MOTORS and
ROBERT ALEXANDER THOMPSON

TORONTO

Oct. 6

Applicants
and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS, C.A.
KENNETH J. HALNAN, MEMBERS

COUNSEL: M. VIRGINIA MACLEAN for Respondent
APPLICANTS - in person

OCTOBER 6TH, 1976

Applicants required a hearing following receipt of Respondent Registrar's proposal to suspend for 30 days Robert Alexander Thompson both as a motor vehicle dealer and salesman pursuant to section 6 of The Motor Vehicle Dealers Act ("the Act"). The Registrar's reasons for the proposed suspensions were that, as dealer, Applicant had employed an unregistered salesman contrary to section 4 of the Act; that, as dealer, he had failed to notify the Registrar of an investment in the dealership involving a possible change in its controlling interest contrary to paragraph 13 (11) of Regulation 98/71 under the Act; and that, as dealer, Applicant had failed to duly notify the Registrar of the commencement of employment, appointment or authorization of a salesman taken on staff, contrary to section 28 of the Act. On such grounds the Registrar claimed justification for the belief that Registrants would not carry on business in accordance with law, integrity and honesty as required by section 5 (1) (b) of the Act.

At the outset the Applicant Thompson, aged 49, married, admitted the above allegations. He had first become registered as salesman in June, 1965 and as dealer in August, 1971. He was also prepared to accept the proposed suspensions but asked that they be served during the month of December instead of October as he needed the fall business to enable him to carry through the winter period when sales would be slack.

The Tribunal ordered that the suspension should be for one month and should be served commencing December 1st, 1976.

ORDERED: Registrar's proposed suspension of one month confirmed varied as to period of suspension.

R 153

FRANK W. SPARROW

TORONTO

Applicant

and

July 16

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL : J.C. HORWITZ, Q.C., CHAIRMAN
CAMERON C. HILMER and
G. DEAN MYERS, MEMBERS

COUNSEL: WILSON E. LEE, Agent for Respondent
APPLICANT - in person

JULY 28TH, 1976

Applicant, having been notified by the Registrar (Respondent) of his refusal to register him as a motor vehicle salesman under The Motor Vehicle Dealers Act, duly required a hearing by the Tribunal pursuant to section 7 of said Act.

In his proposed decision the Registrar based his refusal on section 5 (1) (a) and (b) of the Act referring to Applicant's admitted bankruptcy, convictions for conspiring to defraud, and breaches of the Ontario Securities Act. The Registrar further referred to convictions recorded against the Applicant but not disclosed by him in his application namely, on two counts of conspiracy, on three counts of fraud, and on three breaches of the Bankruptcy Act of Canada. The Registrar, believing Applicant to be the subject of a deportation order pending completion of his parole from prison, and having regard to Applicant's financial position and past conduct, had refused registration to Applicant as financially irresponsible and unlikely to carry on business lawfully or honestly.

Applicant, an American citizen residing in Toronto although lacking a work permit, aged 33 and married, admitted the foregoing catalogue of convictions, that he was an undischarged bankrupt and that he was subject to a deportation order which he intended to appeal.

The Tribunal found Applicant's record to be such as to disqualify him for registration on the basis of his financial irresponsibility and past conduct.

ORDERED: The Registrar's refusal to register Applicant is sustained.

1976

BRIAN TAYLOR

Applicant
and

OTTAWA

Mar. 29

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
RespondentTRIBUNAL : J. C. HORWITZ, Q.C., CHAIRMAN
CAMERON C. HILLMER and
DON MANN, MEMBERSCOUNSEL: M. VIRGINIA MACLEAN for Respondent
APPLICANT - in person

APRIL 2nd, 1976

Applicant, having been refused registration as a motor vehicle salesman by Respondent Registrar's proposal made on February 11th, 1976, required a hearing pursuant to section 7 of The Motor Vehicle Dealers Act. Registrar's reasons for such refusal were that Applicant had equivocally, if not falsely, responded to questions in his written applications for registration concerning former convictions and past employment so as to deceive the Registrar. In fact Applicant had a considerable record of convictions for non-violent crimes which were not "minor offences" as represented by Applicant in a sworn application.

Applicant, 36 years of age having two infant dependants, was in receipt of a 50% Ontario Workmen's Compensation Board disability award arising from a back injury which limited future employment to sedentary occupations. Registrar had indicated his willingness to consider a fresh application for salesman registration following at least six months record of good conduct in another industry.

The Tribunal accepted evidence as above stated and was impressed with Applicant's efforts at rehabilitation since 1972.

ORDERED : Registrar to issue registration after three months, subject to good conduct.

TED TAYLOR'S USED CARS and
THEODORE M. TAYLOR

TORONTO

Apr. 13

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL : J.C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
FRANK ROWLAND, MEMBERS

COUNSEL: H. MICHAEL KELLY for Applicant
A.N. MAJAINA for Respondent

APRIL 20TH, 1976

Proceeding under section 7 of The Motor Vehicle Dealers Act, Applicant Theodore Taylor, wishing to resume operations of a motor vehicle dealership under the name of Ted Taylor's Used Cars, as proprietor and as salesman therefor, duly required a hearing in regard to the Respondent Registrar's proposal to refuse him registration as dealer and salesman. The Registrar had supplied fully stated reasons for such refusals, which, briefly stated, were that Applicant in completing applications for registration had consistently failed to disclose information reasonably required concerning his recently past occupation; that his conduct as a salesman for an automobile dealer was the subject of a complaint that he had caused loss to his principal by acting contrary to instructions or in excess of his authority; that he had apparently engaged in the business of a dealer while not registered. On these grounds Registrar found Applicant Taylor wanting in integrity and honesty and that his past conduct indicated he would not carry on business within the law.

At the outset the parties' counsel advised the Tribunal that they had reached agreement as to the manner of disposing of the matter under section 4 of The Statutory Powers Procedure Act, 1971. Applicants admitted the facts alleged by the Registrar as above stated, that there had been purchases and sales while Applicants were unregistered and that there were twenty cars presently offered for sale on a used car lot rented under a lease expiring in three months. Applicants desired temporary registration permitting time to dispose of the present inventory to which proposal Respondent consented.

ORDERED: Applicants to be granted temporary registrations for three months and meanwhile not to purchase further motor vehicles, and subject to continued good behaviour.

R 143

1976

KAMAL PAL SINGH

TORONTO

Applicant

May 11

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
SADIE MORANIS, MEMBERS

COUNSEL: GEORGE A. MARRON for Applicant
VIRGINIA MACLEAN for Respondent

MAY 31ST, 1976

Applicant, having been refused registration as a real estate salesman in respect of his initial application by the Respondent Registrar, required a hearing pursuant to section 9 of The Real Estate and Business Brokers Act. In his proposal refusing registration the Registrar gave as his reasons for such refusal that Applicant had been convicted of two offences under the Criminal Code of Canada for sexual assault and gross indecency and had been sentenced to 24 months probation and 30 days in jail. Registrar further cited false statements sworn to by Applicant in his written application.

Applicant, aged 38, married and without other dependants, had emigrated from India at the age of 29 obtaining Canadian citizenship only in 1975. According to his testimony he had studied in honour Economics in India, and in Industrial Management in England and New York. He had obtained a passing mark in the obligatory course of study for real estate salesman and had received an offer to work as such with the real estate department of a trust company.

An explanation of several apparent discrepancies in Applicant's past record as represented by him in his application was offered in a letter from the trust company official who had not only administered the jurat to Applicant in his supporting affidavit but had entered, or caused to be inserted, incorrect information therein. Although such official did not appear to testify in explanation of such carelessness on his part, the Real Estate Sales Manager testified that the trust

company was prepared to hire Applicant despite their knowledge of his convictions mentioned above and that the sentence of probation would, if fully served, terminate only in September 1977.

The Tribunal was not prepared to accept the proposition that a person found guilty on two counts involving moral turpitude should be employed in an occupation involving attendances in residential premises nor was it prepared to entirely accept the version offered to explain the serious misstatements in Applicant's written application. The conclusion was that Applicant would not carry on business within the law, and with integrity and honesty.

ORDERED: The Registrar's refusal to register Applicant as a real estate salesman is confirmed.

1976
TORONTO
Sept. 28

KANNA REALTY LIMITED and
JOHANNES B. KANNEGIETER

Applicants

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and
ROBERT A. DOWLING, MEMBERS

COUNSEL: APPLICANTS - in person
A.N. MAJAINA for Respondent

SEPTEMBER 28TH, 1976

Applicants, an incorporated real estate broker (Kanna Realty) and its owner J.B. Kanngieter (Kanngieter) a real estate broker who solely conducted its affairs, were registered as such under The Real Estate and Business Brokers Act ("the Act"). On receiving notice of the Respondent Registrar's proposal not to renew such registrations, Applicants duly required a hearing pursuant to sections 8 and 9 of the Act on the grounds defined in section 6 subsection (1) (b) as regards Kanngieter and subsection (1) (c) (ii) as regards Kanna Realty and subsection (1) (d) as regards both Applicants. Paraphrased, these provisions of the Act require a reasonable standard of business integrity, honesty and legal activity and compliance with all provisions of the Act and regulations thereunder. The Registrar, in support of his action, duly furnished particulars of Applicants' shortcomings alleging (1) want of frankness and co-operation on Kanngieter's part in supplying reasonable information to which the Registrar and his investigators were entitled, in short, reaches of section 26 (1) of the Act; (2) failure to keep proper books and records in connection with the business, particularly sales record sheets and a trust ledger contrary to section 30 (1) and (2) of the Act; (3) failure to deposit and hold in trust, separately and apart from the business' own funds, all moneys received in trust contrary to section 31 (1) of the Act; (4) in furnishing false information in applications and annual returns; (5) in improper office procedures and in employing and enumerating persons not registered contrary to section 47 of the Act;

(6) that Kannegieter carried on real estate brokerage through companies, syndicates, partnerships and entities not registered under the Act; (7) that Kannegieter while directing, operating or acting officially for such companies etc. mentioned in (6) was in contravention of section 3 (1) (c) of the Act; (8) that Applicants purchased interests in real estate without disclosing their respective capacities contrary to section 42 (1) of the Act; (9) that Applicants, as agents in their business activity, did not make such disclosure as required by the law of agency in the interests of their principals; and (10) that Applicants failed to indicate, where required, their respective capacities as co-broker and agent. Such allegations were documented by reference to a list of some 28 real estate transactions over approximately 6 years.

At the outset the parties indicated their wish to proceed under section 4 of The Statutory Powers Procedure Act by filing an agreement recently entered into whereby the Applicants accepted a suspension of their registrations for one year and thereafter upon terms as to their strict compliance with the Act's provisions relevant to the foregoing complaints for a further period of six months extending beyond their re-instatement and during such period their conditional registrations would be subject to revocation by the Tribunal for breaches of compliance in respect of any of their covenants in such agreement or upon a proven complaint relevant to their fitness as brokers.

ORDERED: Suspension for one year and upon terms for six months following reinstatement.

1976

BRUCE A. McNABB
Applicant
and

TORONTO
Jan. 27

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and
JOSEPH STRUNG, MEMBERS

CONSEL: M. VIRGINIA MACLEAN for Respondent
APPLICANT - in person

JANUARY 27TH, 1976

Applicant, a registered real estate salesman, required a review of respondent Registrar's proposal to suspend his registration made pursuant to section 6 (1) (a) and (b) of The Real Estate and Business Brokers Act ("the Act") on the grounds that he lacked financial responsibility in the conduct of his business and that his past conduct afforded reasonable grounds for belief that he will not carry on business within the law and with integrity and honesty. Notice of the conduct complained of was given to the Applicant in accordance with section 9 (1) of the Act and it was that he had withheld information in his sworn application for registration, namely that only two of three existing court judgments on debts against him were revealed although he had seven months later apparently voluntarily informed the Registrar of "an impending claim in bankruptcy". In fact, by such time, he had already made a voluntary assignment under the Bankruptcy Act showing a deficiency of \$13,805.00. The Registrar in his proposal indicated he was prepared to review Applicant's status following his discharge from bankruptcy.

Applicant, 44, married with three defendant children, first became registered in August, 1974. His explanation as to the discrepancy in his application above-noted was that it was due to an oversight. There had been no dissatisfaction with his performance as a real estate salesman with either of his trust company employers. The Tribunal was satisfied the public interest would be served by continuing his suspension only until his discharge from bankruptcy.

ORDERED: Suspension confirmed, to be lifted on Applicant's discharge from bankruptcy subject however to satisfactory conduct meanwhile.

LOUIS GEORGE MEURER III.

Dec

Applicant

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL : J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C., and
W.J. BINGLEY, MEMBERS

COUNSEL: A. N. MAJAINA for Respondent
APPLICANT in person

DECEMBER 14TH, 1976

Respondent Registrar issued a proposal under section 9 of The Real Estate and Business Brokers Act ("the Act") wherein he would have suspended for one month Applicant's registration as a salesman under the Act. Applicant thereupon required a hearing. In his proposal Registrar cited the past conduct of the Applicant in having on several occasions received and retained commissions by way of finder's fees from mortgage brokers contrary to section 41 of the Act which expressly prohibits salesmen from accepting "any commission or other remuneration for trading in real estate from any person except the broker who is registered as his employer". Trading in real estate is defined in the Act so as to include the negotiating and arranging of mortgages. Applicant admitted receiving and retaining the commissions referred to by the Registrar while in the employ of a real estate broker.

The parties requested the Tribunal to give its decision orally without reasons. The Tribunal found Applicant had contravened section 41 of the Act, the provisions of which he was, or at least ought to have been, aware.

ORDERED: There will not be a suspension for one month as proposed. Applicant's registration will continue but subject to conditions of good behaviour for six months.

1976

ALEX POLYCHRONOPOULOS

TORONTO

Applicant

Sept. 22 & 23

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL : J. C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS and
JOHN VOORTMAN, MEMBERS

COUNSEL : VIRGINIA MACLEAN for Respondent
APPLICANT - in person

OCTOBER 22ND, 1976

The Applicant, a real estate broker registered under The Real
state and Business Brokers Act ("the Act") required a hearing by way
of review of Respondent Registrar's proposal to revoke such registration
under section 6 of the Act because of Applicant's alleged past conduct
which the Registrar claimed afforded reasonable grounds for a belief that
he would not carry on business honestly, with integrity or legally, reciting
particulars of complaints regarding purchase-sale transactions of four
residential properties in which Applicant, when a registered real estate
salesman, had been involved as principal of, or agent for, persons he
apparently induced to "front" for him to their eventual loss or detriment.

Applicant, aged 29, married, had emigrated to Canada in 1951 and
was fluent in English. On the other hand, three complainants, who were
compatriots of the Applicant of the same ethnic origin and had rather
less comprehension or agility in English, came forward as witnesses
and were questioned through interpreters. Applicant had arranged for
the sale of property listed with his employing broker at a price of \$18,500
to his sister and, immediately after the closing, a further sale to a friend
at a price of \$32,500 by a deposit of \$3,000 and the balance secured by
first and second mortgages of \$20,000 and \$9,250 respectively which were
then assigned for a value of \$27,500. Applicant's friend, the second pur-
chaser (Nanos) complained that Applicant had promised him, for so lending
his name, a quick profit of \$1,000 which he had not received and that he
had been in receipt of demands from, and been sued by, the mortgagees
and had incurred legal expenses and loss of personal income in the same
connection. Although the Applicant had belatedly repaid a loan from
Nanos he had failed to pay him \$1,000 he needed to close a real estate
purchase of his own thus causing him to forfeit, or at least suffer post-
ponement of the return of, the deposit he had made with his offer.

Petropoulos, 24, a Canadian resident for 7 years, speaking through an interpreter, had been persuaded by Applicant to become a front for Applicant with the expectation of a profit to both. A second proposition from the Applicant involved both parties in a joint purchase of a \$40,000 property, each to deposit \$5,000 and obtain \$28,000 by way of mortgage loan. Petropoulos, suspicious by now, refused to sign the mortgage application and, of his \$5,000 advance, Applicant had so far returned only \$2,000. Petropoulos was also invited by Applicant to join with him in purchasing a \$40,000 property, each to contribute \$5,000 to the \$10,000 deposit required. The ultimate holder of the first mortgage finally wrote off a loss of \$12,000 on the deal.

Panagopoulos, a five year Canadian resident, was another complainant who was approached by Applicant with a view to the joint purchase in the former's name of 1578 Dupont Street for \$64,900. by a cash deposit of \$10,000 (\$5,000 from each partner) a first mortgage of at least \$40,000 to be arranged and the balance by vendor taking back a second mortgage. The deal was accordingly completed by Panagopoulos, the rents from the tenants being collected by Applicant who failed however to account to his partner for his share of the rents or to contribute toward the mortgage installments, taxes and utilities. Panagopoulos claimed to have lost at least \$4,800 through the transaction. Another complainant, a solicitor who had arranged for a client to purchase, as an investment, the vendor's second mortgage of \$15,400, had had to make good his client's loss in full when default occurred.

Expert evidence was accepted by the Tribunal as to the authenticity of a number of signatures on the documents carrying out the above transactions from which it appeared the alleged signatures of Petropoulos and Nanos on three documents had been forged which fact was found to be consistent with the parties' own protestations that they had not signed the documents. Criminal charges were subsequently laid against the Applicant for uttering forged documents.

Applicant testified after being informed of his rights to the protection of the Canada Evidence Act which was granted to him by the Tribunal. He explained the testimony of his former employer, Loandartin, regarding his suspicions of Applicant's conduct because Applicant had lured five of his former employer's salesmen to work for him when he opened his own real estate brokerage. Moreover, he pointed out, his employer had not seen fit to raise complaints against him until Applicant had left his employ and Loandartin had been content to have his firm receive the commissions attributable to the very activities of the Applicant he now complains of. Applicant claimed to have full authority from Petropoulos on the strength of a written direction to sign and negotiate cheques (one of the documents found to contain the forged signature of Petropoulos); as for the disputed

signature of Nanos on a purchase agreement alleged to have been forged, Applicant said he "believed" Nanos signed it. He testified there were no present judgments for payment of money against him, a statement disproved in reply evidence of two banks' judgments amounting to more than \$14,000 against his brokerage company. Applicant generally denied all allegations against him and asserted that Petropoulos was lying in claiming to have contributed to renovations to the property which had in any case been purchased by Petropoulos alone and not, as alleged, in partnership with the Applicant. Applicant claimed to be a respected member of the Toronto Greek community and that his membership on the Toronto Real Estate Board had been lost due to the wrongly inspired actions of his former employer.

The Tribunal found Applicant had contravened section 42 of the Act in failing to produce to vendors a statement of Applicant's capacity as salesman when purchasing real estate, that Applicant had misled Nanos, Petropoulos and Panagopoulos and used them to his selfish advantage and to their financial loss, that he had lied in giving testimony, and that he had witnessed signatures knowing them to have been forged. Such conduct afforded ample grounds to the Respondent in revoking Applicant's registration.

ORDERED : The Registrar's proposal to revoke is sustained.

JUDY REA

Applicant

TORO

Sept.

and

REGISTRAR UNDER THE TRAVEL INDUSTRY ACT

Respondent

RE APPLICANT'S CLAIMS UPON THE COMPENSATION
FUND CONSTITUTED UNDER THE TRAVEL INDUSTRY
ACT, 1974TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W.W. EVANS, C.A. and
PETER BONCH, MEMBERSCOUNSEL: W. BRUCE DRAKE for Applicant
M. VIRGINIA MACLEAN for Respondent

NOVEMBER 22ND, 1976

Applicant's claims in respect of her clients Green (for \$591.) and Twyford (for \$110.) upon the Compensation Fund ("the Fund") constituted under the Schedule to Ontario Regulation 667/75 ("the Schedule") made under The Travel Industry Act, 1974 ("the Act") were denied by the Board of Trustees in the first instance. The Board's decision rendered on August 5th, 1976 was without reasons other than a declaration that Applicant was not an eligible participant in the Fund as having the mere status of an unregistered travel agent. Applicant now appeals the Board's decision as provided in section 15 of the Schedule to the Regulations under the Act. The present hearing, held on Applicant's request, was to determine Applicant's eligibility or otherwise, after a full inquiry into all the circumstances.

Applicant had developed business dealings with a registered travel wholesaler, Blue Vista Tours Incorporated ("Blue Vista") an eligible participant in the Fund before it ceased operations due to an abrupt insolvency occurring during the final days of 1975. The registration of Blue Vista as a travel wholesaler was revoked as of January 23, 1976. In her present application Applicant seeks to be reimbursed for moneys she advanced on account of her two named clients for travel services ultimately not rendered due to the collapse of Blue Vista.

The Fund is comprised of funds derived from assessments upon the participants - all Ontario registered travel agents and wholesalers - less amounts directed to be paid out to claimants from time to time by the Board of Trustees. In order to succeed therefore Applicant would have to show her qualification as a participant (in the Fund) as defined in section 15 of the Schedule as amended.

Applicant, an instructor in yoga at local schools and a community college, entered into an arrangement with Blue Vista in order to conduct retreats for her yoga students and others choosing to travel with them in groups to Nassau or Jamaica where Blue Vista operated hotels. In return for signing-up travellers purchasing all-expense holidays from Blue Vista and collecting their deposits and balances of purchase moneys she was to receive a commission based on the package cost. Six such trips were arranged at the Blue Vista hotel in Nassau and one in Jamaica. It was understood Applicant would conduct each group from Toronto to destination, assign hotel rooms, hold daily yoga sessions and generally represent her "charges" as a tour leader dealing with their needs and complaints. The management of Blue Vista valued Applicant's services, her numerous contacts and her ability to fill her group quotas recognizing her success by improving the rate of commission she received from 12% to 20%. Applicant was thus able to offer reductions in travel package rates by splitting such commission in favour of her clients so as to reduce their travel costs by 10% for off-peak travel. Blue Vista further accommodated Applicant by requiring payment in full of group travel cost 30 days before departure instead of 42 days required of other travel agents. Applicant received directly and deposited in a special bank account in her name all travel payments from her clients, forwarding the group cost to Blue Vista and retaining her commissions, her out-of-pocket expenses and profit. In 1975 between February and December her receipts totalled \$36,800. from which was paid out \$33,647. and remuneration retained (after accounting for uncollected cheques) of \$3,219.

Applicant's client Green paid by cheque to Applicant dated December 17th which she negotiated on December 30th after she had already forwarded the client's travel cost to Blue Vista. Green stopped payment of his cheque. Twyford's cheque, in Applicant's favour also negotiated after an apparent two week delay, was returned n.s.f. after she had advanced the sum of \$110. for Twyford's account. In both cases the moneys advanced by Applicant in good faith were found to be uncollectable from Blue Vista due to its insolvency. Applicant explained the apparent careless delay in negotiating the cheques saying Green's cheque despite its date, was not received until the day before it was presented and that she had been unsuccessful in obtaining from Twyford a replacement for his cheque which had been post-dated.

Applicant's counsel sought to base her present claims upon her supposed relationship with Blue Vista as that of an employee. Evidence offered tended to show she was at all times representing Blue Vista. Applicant's husband told of conversations he had with Blue Vista's manager to the effect that Applicant was "the best salesgirl we have", a "great sales representative" etc. Applicant offered yoga instructions to all guests at the Blue Vista hotels and not merely to her own group.

A travel wholesaler of 20 years' experience, called by Respondent explained the respective roles of airline, travel wholesaler, travel agent and the manner of compensating individuals who bring together and manage single group tours by the reward of a free trip with some expenses or occasionally a commission. Such individuals were prevented from handling group travel funds after July 15, 1975 upon enactment of the Act unless such individuals were registered travel agents. On cross-examination the witness admitted there was nothing to prevent travel agents or wholesalers from hiring commission employees.

Following consideration of lengthy written submissions of law, the Tribunal accepted Respondent's argument that the facts supported the position that Applicant was an independent contractor as meeting the four tests laid down by the Judicial Committee of the Privy Council in *Montreal Locomotive Works* [1947] I.D.L.R. 161. Applicant was carrying on business for herself and not for a superior and there existed no employer-employee relationship but rather employer and contractor. Holding that it was the purpose of the Act to protect members of the travelling public the Tribunal found Applicant in organizing trips for groups was acting as an unregistered travel agent and was an independent contractor and as such not eligible to receive compensation from the Fund for the sums claimed.

ORDERED: Applicant's claims are disallowed in toto.

A24N
CC40
C56

Summaries
of Decisions
Volume B



Ontario

Commercial Registration Appeal Tribunal

COMMERCIAL REGISTRATION
APPEAL TRIBUNAL

Summaries of Decisions

Volume 6



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL



SUMMARIES OF DECISIONS - VOLUME 6

(Decisions during 1977)

These are summaries of all decisions and reasons given following hearings in 1977. If reference to the full text of a decision is desired application should be made to the Tribunal's Office, Toronto, Ontario.

Published pursuant to The Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario 1970, Chapter 113.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TABLE OF CASES SUMMARIZED

APPLICANTS

<u>Business Practices Act</u>	<u>Page</u>
Moffatt, Donald Bell	1
Pollock Dance Club	4
Pollock, William G.	4
Thermojet	1
William G. Pollock Studio of Dancing Limited	4
 <u>Motor Vehicle Dealers Act</u>	
Alexander McNeil Ltd.	9
Arel, Paul	11
Bacchus, Lloyd Alfred	12
Beaupre, Larry	14
Canada Auto Auctions Ltd.	16
Durnan, Lawrence E.	18
Economy Auto Sales	20
Ivill, Jack	22
Johnson Motors	24
Johnson, Rose	24
Johnson, Sam	24
Kelley, Berton C.	26
Kitchener-Waterloo Car Market	27
Kowtaluk, Donald John	29
Kuehne, Bert	31
McNeil, Alexander	9
Menary, Kevin	16
Muranyi, John	20
Ontario Sports	14
Pizzati, Vincent D.	32
Ramminger, Willi	27
Rivas, Mary	16
Triangle Auto Mart	29
War-Dan Auto Sales	18

<u>APPLICANTS</u>	<u>Page</u>
<u>Ontario New Home Warranties Plan Act</u>	
Civic Tower Limited	33
Mastrangelo Developments Limited	34
Pereira Construction Company	35
Treadway, Kenneth Jefferson	36
<u>Real Estate and Business Brokers Act</u>	
Arnold, Allen Frank	37
Devers, Robert Leslie	38
A. Organ Real Estate Limited	42
Organ, Albert	42
Wilson, Raymond P.	37
<u>Travel Industry Act</u>	
Rudolph Travel Service	44
Sconza, Mario	45
Stevenson, D. E.	46

TORONTO

DONALD BELL MOFFATT

Mar. 20
Apr. 21 & 22

carrying on business as

THERMOJET

Applicant

and

THE DIRECTOR UNDER THE BUSINESS PRACTICES ACT

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and
IRWIN CASS, Q.C., MEMBERSCOUNSEL: JOEL GOLDENBERG for Applicant
MICHAEL W. BADER for Respondent

MAY 18TH, 1977

The Director gave notice to the Applicant pursuant to subsection 1 of section 7 of The Business Practices Act ("the Act") that the Director believed on reasonable and probable grounds that Applicant was engaging in an unfair business practice as defined in section 2 of the Act and Applicant was thereby ordered to immediately cease and desist therefrom pursuant to section 7 of the Act. The Director's order specified the practices complained of as representations that a device called Thermojet, if fitted to a domestic warm air furnace, would produce savings in winter heating costs and increase the heating efficiency thereof. The Director's order as notified to Applicant bore an attachment setting forth his reasons and grounds of his belief that Applicant was guilty of making false, misleading or deceptive consumer representations in his sales literature. In support of his order the Director attached thereto a printed brochure used by Applicant in promoting sales of Thermojet which in four pages of copy set forth numerous advantages for the device and explained the operational principles and results.

The Director called as an expert witness a scientist who had conducted tests under controlled conditions of the device while attached to a standard heating unit and produced print-outs of comparative results measured against the same heating unit operating without the device. His conclusions were that his tests showed no clear advantages for the device. His opinion was that

most of the advantages claimed in the brochure above-mentioned were without foundation, in fact, that there was no increase in efficiency and no fuel saving and that, if anything, heating costs to produce a given temperature were increased through use of the device. He queried the theories and principles relied on by the Applicant. He defended his method of testing in a laboratory rather than a house as being more reliable. He attempted to refute claims made for Thermojet in Applicant's sales literature and testimonials used in promotion of sales. He disputed the claim that Thermojet could raise the air pressure in a house so as to reduce incoming drafts of outside air as claimed. Of a study prepared by a social research and planning group at the behest of the Applicant which amounted to a survey of 245 owners of Thermojet by means of a questionnaire he characterized it as useless and possessing not the slightest validity because of the number of variables and unmeasureable personal factors.

Applicant called the director in charge of the preparation of the last mentioned report to explain the methods employed in making the survey and as to the conclusions which he admitted were more "common sense" than statistically reliable. He admitted there had been a number of assumptions made which could be questioned because they could not be verified. Two satisfied users of Thermojet were called to give testimonials in laymen's terms. The inventor of Thermojet was called and, as its first promoter, testified to the number of sales. He admitted having no particular training or formal education but questioned the testimony of the expert called by the Director as to his methods of testing and scientific conclusions above mentioned. The Applicant himself testified that he had sold 245 units and had received 25 testimonial letters from satisfied customers and only 13 which could be classified as neutral. The dissatisfied purchasers had taken advantage of his policy of reimbursement of the purchase price of \$169.50 within one year of purchase. He claimed no particular training or knowledge of home heating but questioned the conclusions of the Director's expert above referred to.

The Tribunal did not accept the findings of the survey of users of Thermojet above mentioned as lacking probative value and the testimony of the two satisfied customers as vague and unscientific. The Tribunal accepted the evidence of the expert called by the Director as carefully prepared data objectively assessed. Applicant argues that, relying on Canada Metal v. MacFarlane - 1 O.R. (2nd) 577, that the Director in making an order was bound to act judicially - that is to say, objectively rather than subjectively. The Tribunal distinguished the case cited and found the Director in the present case had indeed acted objectively and on reasonable and probable grounds.

The Tribunal found as facts that the use of Thermojet produced negligible effects when operated on heating systems and hence no measurable change in efficiency or saving in fuel could be thereby achieved. The Tribunal found: 1) that the Applicant was guilty of misrepresenting Thermojet as having performance characteristics that it did not possess, contrary to section 2 (a) (i) of the Act and 2) that by exaggeration, innuendo or ambiguity made deceitful representations or representations tending to deceive, contrary to section 2 (a) (xiii) of the Act.

ORDERED: Applicant shall cease engaging in such unfair practices and publishing, distributing or advertising such false, misleading or deceptive consumer representations and distributing such or similar promotional materials.

1977

TORONTO

Jan. 11-14

Feb. 1-4

Feb. 18

WILLIAM G. POLLOCK STUDIO OF DANCING LIMITED
 operating as WILLIAM G. POLLOCK DANCE CLUB
 and WILLIAM G. POLLOCK

Applicants
 and

DIRECTOR UNDER THE BUSINESS PRACTICES ACT, 1974
 (also called THE DIRECTOR OF THE CONSUMER PROTECTION
 DIVISION).

Respondent

TRIBUNAL: J.C. HORWTIZ, Q.C., CHAIRMAN
 H.F.H. SEDGWICK and
 HELEN J. MORNINGSTAR, MEMBERS

COUNSEL: WILLIAM R. HERRIDGE, Q.C., for Applicants
 A. N. MAJAINA for Respondent

MAY 22nd, 1977

The Applicants, the Pollock School of Dance ("the Pollock Studio") incorporated as above and William G. Pollock as its president and managing director, were the subjects of an order of the Director of the Consumer Protection Division, the present Respondent ("the Director"). The order, made under section 7 of The Business Practices Act, 1974 ("the Act") directed Applicants to immediately comply with section 3 of the Act by ceasing and desisting from unfair business practices specified in such order. It was alleged that Applicants were, in their course of business making false, misleading and deceptive consumer representations contrary to section 2(a) (xiv) of the Act; making unconscionable consumer representations contrary to section 2(b) (ii) of the Act; and making unconscionable consumer transactions contrary to section 2(b) (vii) of the Act. Such order gave rise to a request by Applicants for a hearing which was conducted over a span of 9 days and the Tribunal was occupied in reaching a decision whether the Director's allegations were supportable on reasonable grounds.

Pollock had operated the Pollock Studio at a Toronto place of business where ballroom dance instruction was taught at least since 1965 when the business was incorporated in the above style although it also operated as the Pollock Dance Club.

Three female customers testified to their experiences with the Studio through Mr. Pollock and its business and instructional staff, each having responded to the same advertisement in Toronto newspapers which apparently offered 8 dance lessons for \$10. and identified the Studio and its telephone number. Each was single, without family in Toronto, and recently come to live and do office work here. Each had called at the Studio in response to the same form of advertisement offering 8 lessons for \$10. - if half an hour is accepted as the usual length of a lesson - a rate much below the average of quoted rates in Toronto. On the introductory visit, after a short dance with an instructor, the instructor - usually one van Gelder - would draw each into conversation over coffee in which they would be invited to reveal their reasons for learning to dance, their jobs and earnings and personal circumstances. At successive sessions each was encouraged to reveal more and more of her background, financial responsibilities and economic expectations and encouraged to suppress other ambitions in favour of expertness in dancing as a social asset beyond compare. A girl of 21 earning \$375. per month was "sold" a dance contract costing \$515. payable over five months and before long a substitute contract for 25 hour long lessons for \$1,933. to be financed. Although each contract was by express terms cancellable, she was met with a demand for payment of \$575 in order to cancel.

The second and third witness had similar experiences. A secretary, aged 28 and a recent emigree from Tanzania, then earning in excess of \$500. per month, was induced to "sign up" for 80 half-hour lessons, private and group, for \$2,042. payable over 18 months; when she later revealed savings of \$2,000-3,000 van Gelder opened the prospect of a club membership reserved for Bronze Medallion candidates, the course leading thereto costing about \$20,000. After persistent and intensive persuasion coupled with the possibility of a future as an instructress, she signed for \$9,996. of lessons and membership in the Hobby Club as a Junior Member. Attending regularly, for a period every week-day evening, she was in turn encouraged with reports of progress and subtle demands for money payments, if necessary through borrowing, until finally she financed the unpaid installments through a \$2,573. loan at 13.5% per annum. When later she attempted to unilaterally cancel the current contract she was invited to enter into discussions with Pollock and, when she declined, she was threatened with suit.

The third witness, aged 37, earning about \$140. per week as a legal secretary was first quizzed by van Gelder concerning her plans and living style and told of three types of contracts costing \$500, \$2,000 and one much larger. With an impelling desire to learn dancing and for the promise of companionship she signed for \$2,042. of lessons of 80/80/80 half hours of private, lead/follow and choreography respectively. On later reflection the same evening

she wrote the Studio with the intention of cancelling, giving it to van Gelder the following evening, her purpose being to revert to the \$500. contract. She continued however with lessons and was induced later to sign up for \$19,825. of lessons in one contract for 350 hours of private lessons leading to the Bronze Medal and membership in the Hobby Club. Financing was arranged with Pollock through the Studio's finance company. Finally after months of instruction without fulfilment of the promise of a chance to teach and so reduce her indebtedness and after a studied neglect on the part of the Studio instructors she decided to cancel through action by a lawyer. She had expended about \$1,000. for 106 hours of instruction.

A former Pollock Studio instructress with classical ballet training told of the inside selling techniques employed by the Pollock staff during her 20 months there. Commencing at \$80. per week she later received \$6.00 per hour of instruction plus 2% commission on sales. There were regular sales meetings to brush up on salesmanship using a sales procedure manual which remained in the office. The progress of pupils and extension of their courses were reviewed and emphasis was given to overcoming sales resistance. Her opinion of the Pollock instructors' teaching ability was that it was not high except for Pollock himself and her subsequent career with several Toronto dance studios lent authority to her opinion that the Pollock Studio charges were comparatively high.

Another Toronto dance studio proprietor of considerable experience in the industry was called as an expert. He admitted that pupils were commonly manipulated emotionally by means of flattery, encouragement, reinforcement of ego and by conscious prying into the psyche. High passing marks were invariable and confidence thus used to induce the pupil to enter upon longer courses. The 8 lessons for \$10. ad was, in his opinion, a "loss leader" to expose the prospect to the sophisticated selling methods of the smooth talking instructor salesmen and, once enrolled into the dream-dance world, only "woke-up" with the realization that he or she was committed to pay a large sum of money well into the future. Comparative prices for attainment of the Bronze Medallion (the highest standing awarded at the social level of dancing by the Ontario Dance Association comprising most dance studio operators) were five times higher at Pollock Studio than at another Toronto school. This witness, operating owner of a successful studio in Toronto, was expelled from the Society because he refused to sign pupils into long contracts and offering instead lessons only at the hourly rate of \$4.00 per hour for group instruction, no private instruction being offered.

Applicants presented evidence by its instructor van Gelder who had received his training on the job while instructing part-time. As to the Studio's policy in selling, his testimony was at variance with that of the two previous witnesses and contrary to their suggestions of over-selling. He denied "high pressure" methods were used. He earned \$7. per hour and 7% of commissions on sales. He countered the suggestions of the three disgruntled pupils that they did not receive the hours of instruction paid for. He asserted all students were free to cancel at any time and commonly did. In reviewing each complainant's record van Gelder said the financial implications of each contract were carefully considered and reviewed with the pupil and tailored to their capabilities, financial and instructional. He told of the activities of the Hobby Club saying there were four to eight parties a year entirely at the Pollock Studio's expense. He denied using undue pressure on any student although he admitted his enthusiasm for the benefits of dancing. In sum, his testimony amounted to denials that the cost of Pollock Studio lessons were excessive, that the contracts made with pupils were excessively one-sided or incapable of performance, that representations as to a pupil's potential were unconscionable, that undue pressure was applied, psychological or otherwise, to obtain contracts.

This witness went into considerable detail regarding the operations of the Pollock Studio and particularly as to the transactions of the three pupils. However, the Tribunal found much of the evidence of this witness to be unsatisfactory and, whenever at variance with that of any of the three pupils, was rejected as untrustworthy.

A second witness for Applicants was a satisfied young man of 25 who had also begun with the introductory course of eight lessons for \$10. going on to purchase first a \$500. program, then a \$4,000. course and finally the Bronze contract for \$12,000 and achieved Bronze standing after receiving extra lessons gratis. He had been well satisfied with the instruction and the Hobby Club evenings.

A sales manual for instructors was admitted over the objections of Applicants' counsel that it could not be proved to have been in use during the material time.

The Tribunal noted that Pollock himself, as the person most familiar with the operations of the Studio, did not testify although he would be in a position to shed light on the matters complained of.

The Tribunal found there had been breaches of section 2 of the Act committed by the Applicants during material times as alleged, namely - of section 2(a) (xiv) by advertising eight lessons for \$10. when the true purpose was not to offer such a few hours at a bargain price but rather to exploit the opportunity to expand the instruction into major purchases of extended hours; of section 2(b) (vii) in making a misleading statement of opinion that a pupil possessed the potential to achieve the standard required of a dance instructor which was calculated to be relied upon and was relied on to a pupil's detriment financially; of section 2(b) (viii) in subjecting the three female pupils to undue pressure to enter into unreasonable contracts and (having regard to their financial situations) for which there was no reasonable probability of payment possible, contrary to section 2(b) (vi).

ORDERED: Applicants shall cease engaging in the above unfair practices and from advertising "loss-leader" dance lessons for the purpose of switching prospects into extensive contracts and from importuning relatively defenceless pupils into unwanted or extravagant contracts and from soliciting sales of new, longer contracts over uncompleted contracts. The Tribunal forbade the use of the "enrollment agreement and contract" without specified hours of group and choreographic dance lessons therein. The Tribunal directed rescission of the contracts of the three testifying pupils.

1 9 7 7

TORONTO

ALEXANDER McNEIL LTD. operating
as ALEX McNEIL MOTORS, and
ALEXANDER McNEIL

Apr. 12

Applicants
and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS and
ROBERT S. BANNERMAN, MEMBERS

COUNSEL: GEORGE A. WOOTTEN, Q.C. for Applicants
A. N. MAJAINA for Respondent

APRIL 12th, 1977

Applicants applied to the Tribunal for a hearing into the proposal by the Registrar to suspend for six months their registrations as motor vehicle dealer and salesman respectively for reasons very fully stated in the Registrar's notice of proposal as supplemented by additional reasons delivered more than two months after the first. The Registrar's proposal was a recital of the faults found by the Registrar in the conduct of the Applicants since first being registered in 1970, a year before the incorporation of the dealership. A large number of customer complaints had been investigated and found to concern the mechanical condition of used motor vehicles purchased. In the same period eleven convictions had been recorded against the dealership in connection with the failure to provide safety standard certificates or the provision of safety standard certificates found to be false and one conviction for failing to maintain records as required by The Highway Traffic Act. Terms and conditions had been imposed upon and accepted by the dealership for most of 1971 to 1974. The Registrar also referred to two recent customer complaints regarding unsatisfactory behaviour on the part of both Applicants in dealings with them and, in his supplementary reasons for his proposal, that there were fresh customer complaints involving odometer tampering which were supported by specific details damaging to the Applicants and possibly in breach of The Business Practices Act as being unfair business practices. For the foregoing reasons the Registrar had found grounds for his belief that the past conduct of the Applicants was such as to justify a conclusion that they would not carry on business in accordance with law and with integrity and honesty and thus to warrant the suspension proposed.

At the outset of the hearing the parties' counsel advised the Tribunal that they reached agreement whereby the Tribunal might dispose of the matter by its decision without a hearing pursuant to section 4 of The Statutory Powers Procedure Act.

The Tribunal, concurring, made its order suspending the dealer and salesman registrations for six months commencing on June 1st, 1977, the dealership to undertake to dispose of its inventory of motor vehicles by June 1st, 1977, meanwhile not adding to its inventory, and any vehicles remaining on hand on May 31st, 1977 to be finally disposed of only to registered motor vehicle dealers. There would be an added month of suspension for each breach of the foregoing undertakings. Following the term of suspension the Registrar would undertake to consider a renewal of Applicants' registrations if application therefor is made on the conditions that there had been no intermediate breaches of the foregoing undertakings by registrants and that any such application be accompanied by the deposit of a Term Deposit Certificate made payable to the Treasurer of Ontario in the amount of \$5,000. as a penal sum forfeitable upon proven breaches of The Motor Vehicle Dealers Act, offences under the Criminal Code of Canada relative to either Applicant's fitness for registration under The Motor Vehicle Dealers Act, or if either applicant was the subject of any proven complaint received by the Registrar, or had been discovered making false statements to, or withholding information from, the Registrar, or for any dealing in motor vehicles during the period of suspension. Registration, if granted to either Applicant, shall be upon the condition that the records of either Applicant shall be subject to inspection without let or hindrance by the Registrar.

ORDERED: As above.

PAUL AREL

TORONTO

Mar. 22

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
C. C. HILLMER and
HERBERT A. KEARNEY, MEMBERS

COUNSEL: ALBERT MILLER for Applicant
MICHAEL W. BADER for Respondent

MARCH 22nd, 1977

A hearing was required by Applicant following upon the Registrar's refusal to grant him registration as a motor vehicle salesman pursuant to section 7 of The Motor Vehicle Dealers Act ("the Act"). Applicant had held provisional registration for a few weeks in 1976 which was withdrawn by the Registrar in a written proposal with reasons, briefly, that he had testified falsely in his formal application for registration in answering a question asking if he had a record of criminal convictions. Several months later the Applicant applied again and the second refusal, now appealed from, was contained in a proposal with stated reasons namely that Applicant had again provided false information in his sworn application concealing the fact that he had worked as a motor vehicle salesman in Ontario for almost five months without necessary registration. Such refusal was based on section 5 of the Act whereby the past conduct of an applicant may afford reasonable grounds for a belief that he would not carry on business within the law and with integrity and honesty.

At the outset of the hearing counsel for the parties indicated they had reached agreement as to terms which, if satisfactory to the Tribunal, would dispose of the matter without a hearing pursuant to section 4 of The Statutory Powers Procedure Act. Such terms were that Applicant would be free to apply for registration after six months provided he could demonstrate he had not meanwhile been charged or convicted under the Criminal Code of Canada and had not been employed in any capacity in the motor vehicle retail industry and, if salesman registration was thereafter granted to him, it would be provisional upon his continued good behaviour.

ORDERED: As above.

July 4

LLOYD ALFRED BACCHUS

Applicant
and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and
ROBERT H. FOSTER, MEMBERSCOUNSEL: H. DAVID OVENDEN for Applicant
M. W. BADER for Respondent

JULY 21st 1977

Applicant was refused registration as a motor vehicle salesman by Respondent Registrar in his proposal of April 12th, 1977 which, as amended by a supplementary proposal of June 15, 1977, amounted to allegations of conducting a business involving the sale of motor vehicles while not registered as required by section 3 of The Motor Vehicle Dealers Act and while not in possession of a garage licence contrary to The Highway Traffic Act. Under the former Act registered dealers are required to furnish a bond in favour of the Crown the proceeds of which may be available to members of the public who suffer harm at the hands of the dealer. Therefore, if, as alleged, the Applicant was selling motor vehicles to the public, the intended protection of the bond would not be present. The Registrar further alleged that Applicant had, as operator of a car leasing business, sold leased-expired vehicles with liens attached to retail customers without disclosing such liens or, alternatively, if such liens had been disclosed, the lien holders claims were not satisfied from the proceeds of sale. Such conduct on Applicant's part afforded the Registrar reasonable grounds for his belief that Applicant will not act in accordance with the law and with integrity and honesty. It was finally alleged by the Registrar that due to the personal bankruptcy of the Applicant he could not reasonably be expected to be financially responsible in the conduct of business.

Two retail purchasers of lease-expired vehicles testified that they were innocent of any knowledge of outstanding conditional sales contracts respecting the automobiles they purchased although admitting they had neither enquired of Applicant nor searched for liens under The Personal Property Security Act.

As a result of the bankruptcy of the Applicant it appeared no recourse against him was open to them and each was faced with adverse claims of a finance company. A third witness testified he had caused a vehicle to be purchased from Applicant on behalf of a car dealer and, as one with 15 years experience in the car business, he felt entitled to rely on the Applicant to disclose liens and hence made no search. In fact a substantial lien claim attached to the vehicle his dealer acquired from Applicant.

In reply, Applicant testified with the protection of the Canada Evidence Act that he had informed each of the above purchasers of the existence of the lienholder's claim, that he intended to satisfy each claim from the proceeds of sale in his hands, but, because of pressing financial needs for available cash chose deliberately to keep the conditional sale contracts alive by personally advancing installment payments as required until, suffering financial collapse, he was unable to prevent the lienholders claims from maturing. Applicant denied having received any direct personal financial benefits from the above transactions claiming that all sale proceeds were used to bolster his car leasing business. He was presently an undischarged bankrupt with debts in excess of assets of \$80,000. and had lost his home. He was moreover defendant in a suit alleging fraud but he denied any wrong doing on his part, merely bad management. He stated he had sold about 15 vehicles all subject to liens the existence of which he had disclosed to the purchasers.

The Tribunal found Applicant had contravened The Motor Vehicle Dealers Act by carrying on business of a dealer while unregistered; that he had failed in his duty to discharge three liens on vehicles he had sold; that he was an undischarged bankrupt, a state of affairs probably brought on through poor financial management. The Tribunal was however impressed with Applicant's wish to rehabilitate himself if given the chance to work in the industry under supervision. Accordingly, the Tribunal directed Applicant be granted registration as a salesman provided he is found "not guilty" on the above charge of fraud and after being discharged from bankruptcy subject to his good behaviour and while employed by a dealer approved by the Registrar.

ORDERED: As above.

TORONTO

July 13

ONTARIO SPORTS and LARRY BEAUPRE

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK, VICE CHAIRMAN and
KENNETH J. HALNAN, MEMBERS

COUNSEL: APPLICANTS - in person
A. N. MAJAINA for Respondent

JULY 27th, 1977

Applicant Beaupre, operator of Ontario Sports ("Sports"), applying for registration as a motor vehicle dealer on behalf of Sports and, in his personal capacity, as a motor vehicle salesman therefor, was refused in both respects by the Registrar in his proposal in which he stated his grounds very fully. Beaupre had been registered as both dealer and salesman in 1973 which he permitted to lapse by default in renewing. In the application now under review and in similar applications filed in 1975 Beaupre, in completing the statutory affidavits in support of such applications testified falsely in response to questions inquiring whether he had been charged or convicted of any offence under The Retail Sales Tax Act (Ontario) by answering in the negative. In fact he had been convicted in September 1974 of failing to remit retail sales tax collected over a period of five years ending in June 1973. Elsewhere in the present applications he had undertaken in writing not to engage in the business for which registration was sought until authorization was duly given. However the Registrar alleged in his proposal that Applicant had indeed been dealing in motor vehicles including motor cycles while not registered under, and therefore in breach of, The Motor Vehicle Dealers Act ("the Act"). For the foregoing reasons the Registrar, relying on section 5 of such Act, found such past conduct such as to afford reasonable grounds for his belief that Beaupre would not "carry on business in accordance with law and with integrity and honesty".

Evidence was adduced proving the misstatements falsely sworn to above mentioned and, by documentary proof, that Beaupre, through Sports and on his own account, had indeed been buying and selling motor vehicles between May 1973 and January, 1977 in conjunction with his principal business of selling boats, motors and accessories. Beaupre testified, after accepting the protection of the Canada Evidence Act, that the motor cycles he was charged with having for sale were actually purchased for his own use. He admitted all allegations made by the Registrar in his proposal excepting a) an allegation that he had claimed to be a Honda motorcycle franchised dealer; b) allegations that he had sworn falsely to questions concerning charges, convictions or pending proceedings respecting offences under The Retail Sales Act because, as he interpreted the question, since there were no proceedings pending at the time he made his statements, he had answered truthfully; and c) allegations that he had sold motor vehicles contrary to the Act because, although he had bought motor vehicles they were either antique cars or were solely for the use of members of his family and all other transactions were carried out while he was registered. He further testified, and it was not disputed, that no complaints had been lodged against him by members of the public.

The Tribunal found numerous inconsistencies if not outright falsehoods in his testimony, preferring to accept the evidence of the Inspector acting for the Registrar wherever it conflicted with Applicant's. The Tribunal found Beaupre had carried on the business of a motor vehicle dealer while unregistered contrary to the Act, that he had sworn falsely regarding his conviction for breaches of the Retail Sales Tax Act and since he had served a sentence for same in lieu of making restitution of the unremitting tax had presumably retained same. The Tribunal found the Registrar was justified in his belief that Beaupre would not carry on business in accordance with law and with integrity and honesty.

ORDERED: Registrar to carry out his proposal to refuse registrations applied for without prejudice to renewed applications after one year.

TORONTO

June 28

CANADA AUTO AUCTIONS LTD. operating
as CANADA MOTOR SALES, KEVIN MENARY
and MARY RIVAS

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
DAVID A. BAKER, MEMBERS

COUNSEL: WILLIAM J. CORNWALL for Applicants
A.N. MAJAINA for Respondent

JULY 21st 1977

The Registrar having refused to register Canada Auto Auctions Ltd. ("Auctions") as a motor vehicle dealer and to register Kevin Menary and Mary Rivas as motor vehicle salesmen delivered a proposal and his supplementary proposal setting forth very fully his reasons for such refusals and relied on section 5 of The Motor Vehicle Dealers Act which provides exceptions to the right of Applicants to obtain registration where "(i) having regard to (a corporation's) financial position in the conduct of its business or (ii) the past conduct of (a corporation's) officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty". *

At the outset of the hearing counsel for the parties stated agreement had been achieved through negotiation and were permitted to read into the record the terms of such agreement which had not yet been formally engrossed. The Tribunal, having heard and considered the provisions so agreed to, indicated its approval subject to a formal agreement in such terms being filed with it in due course.

A consent agreement dated July 6, 1977 was filed with the Tribunal on July 14, 1977 whereupon the Tribunal's decision and order was delivered to the parties substantially as follows: Auction will receive registration as a motor vehicle dealer and Menary and Rivas registrations as motor vehicle salesmen to be held by them respectively upon conditions of good behaviour and Applicants' consent to voluntarily submit

* (The bracketed words are the editor's)

to inspections for an eighteen months period and Applicants' undertake not to allow participation in the dealership of one Donald Menary and not to deal in vehicles consigned to the dealership for sale and, finally, Auctions will deliver, by way of penalty bond forfeitable on breaches of any of the foregoing conditions, two bank Deposit Certificates each of \$5,000. in favour of Ontario, one to mature on December 31, 1977 and the other on December 31, 1978, to be thereafter returnable.

ORDERED: As above.

R 157

1977

TORONTO

Oct. 25

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: H. F. H. SEDGWICK, VICE CHAIRMAN as CHAIRMAN
C. C. HILLMER and MURRAY C. JEFFERY,
MEMBERS

COUNSEL: PAUL J. FRENCH for Applicants
MICHAEL W. BADER for Respondent

NOVEMBER 3rd, 1977

Applicants required a hearing pursuant to section 7 of The Motor Vehicle Dealers Act ("the Act") into the Registrar's proposal to revoke the dealer and salesman registrations of War-Dan and Durnan respectively (the latter being sole proprietor of the former). The Registrar's proposal fully set forth his reasons for revocation in a number of allegations of breaches of the Act by Applicants which he found disentitled them to continued registration under section 5 of the Act as lacking financial responsibility in the conduct of business and that their past conduct indicated they would not carry on business in accordance with law, integrity and honesty. Such allegations indicated that Durnan had in March, 1977 transferred his business location taking on an inventory of at least eighteen motor vehicles which had been the property of Toronto Auto Sales and eleven vehicles acquired from Reliable Auto Sales although Applicants had failed to produce, despite repeated demands by the Registrar, any satisfactory evidence of bulk sale purchase or by agreement or otherwise of such vehicles. The Registrar accordingly concluded that title to the vehicles had indeed not passed to the Applicants so that they were offering merchandise to which they could not make title. It happened that Toronto Auto Sales had been the subject of an order by the Tribunal, following a hearing near the end of 1976, suspending its registration and permitting it until the end of 1976 to dispose of its inventory of vehicles. The Registrar further alleged breaches of the Act in regard to the keeping of a trust account and trust ledger and that there were discrepancies in the information supplied by Applicants in their applications for registration.

Evidence presented to the Tribunal concerning such discrepancies in information in Applicants' written applications indicated no serious intention to mislead and that such applications had been abandoned in any case and the Tribunal found nothing turned on this allegation.

An Inspector who had been sent by the Registrar to Applicants' premises testified that he found that a trust account was being maintained although not properly designated as such and there was apparently no trust ledger. The inspector had requested but not obtained evidence of purchase by Applicants from Toronto Auto Sales of eighteen vehicles other than a cheque stub indicating Applicants had issued a cheque to Toronto in December 1976 for \$15,770. as payment, which had not been negotiated. The Registrar admitted the vehicles "purchased" from Toronto were correctly recorded in the dealer's garage register. No evidence was offered as to Durnan's financial position.

Durnan, 38 and a widower with two dependant children, testified that the cheque for \$15,770. had indeed been issued by his dealership to the owner of Toronto Auto Sales as evidence of a loan by the latter to the former. Durnan produced for the first time a purchase agreement in respect of the eighteen vehicles. He testified to a satisfactory financial condition which was not seriously challenged. Finally, Durnan denied he had made any arrangement or agreement with the proprietor of Toronto Auto Sales whereby the latter's inventory of cars would be consigned to him and the business would be carried on under Durnan's registration as alleged by the Registrar. In the result the Tribunal found the Registrar's allegations not sustained nor his proposal justified on the evidence.

ORDERED: The Registrar will refrain from carrying out his proposal to revoke registrations of the Applicants who must in future however maintain full and accurate records of transactions.

1 9 7 7

WINDSOR

ECONOMY AUTO SALES operated
by JOHN MURANYI, and JOHN
MURANYI

Aug. 23
Oct. 18

Applicants
and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
C. C. HILLMER and
MURRAY KENNEDY, MEMBERS

COUNSEL: J.K. BALL for Applicants
M. W. BADER for Respondent

NOVEMBER 8th, 1977

Applicants, having been respectively refused registration as motor vehicle dealer and salesman, required a hearing in the matter of the Respondent Registrar's proposal to so refuse them. The Registrar's proposal put forward as grounds for such refusal that Muranyi had in February 1977 been convicted of carrying on business as a motor vehicle dealer between November 1975 and March 1976 while unregistered as such. It was further alleged he had continued to sell cars as a dealer without registration between May 1976, when he was charged with said offence, and the said conviction, carrying out some 26 transactions. Moreover, it was alleged by the Registrar that between December 1975 and May 1976 Muranyi had tampered with the odometers of eight vehicles so that the indicated mileage of the vehicles was reduced in aggregate by 301,745 miles to the detriment of the purchasers of such vehicles. The Registrar concluded that Applicants' conduct afforded reasonable grounds for his belief that, if granted registration, they would not carry on business legally and with integrity and honesty.

At the hearing Muranyi, aged 34 married with one defendant, testified that he had been dealing in used motor vehicles for 15 years mostly as a scrap dealer and that in the previous three years he had only sold about 100 vehicles intended for the road, the remainder going to scrap. He contended most of his retail sales were to relatives and friends although three or four had been sold after being advertised as roadworthy, low mileage vehicles. As for the eight altered odometers, his explanation was that wherever it was found necessary to replace a car's power train or transmission, he adjusted the vehicle's mileage

to more truly reflect the mortality of the vehicle and, in so doing, took into account the condition and appearance of the body after touching up the exterior paint. He sometimes took pains to inform a purchaser of, and the reason for, the changed mileage. Regarding his conviction for carrying on business as a car dealer while not so licensed he explained that he had pleaded guilty on the tacit understanding that he would thereby ensure that no obstacle would be put in his way of obtaining registration as dealer and salesman. Finally, Muranyi claimed exemption from the legislative prohibition against odometer tampering since he was not at the time a registered dealer and hence not subject to the legislation.

The Tribunal found as facts that Muranyi: 1) had been convicted of carrying on business while unregistered, contrary to section 3 of The Motor Vehicle Dealers Act; 2) had altered or changed odometers in eight vehicles, contrary to section 19 of Regulation 98/71 under the Act, and thus consciously misrepresented the mileages on vehicles he sold to innocent purchasers, to their detriment. Accordingly, the Registrar was justified in refusing registration on the basis of Applicants' past conduct.

ORDERED: The Registrar shall carry out his proposal to refuse the registration sought by Applicants.

1 9 7 7

TORONTO

J A C K I V I L L

June 10

Applicant
and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and
PAUL WILLISON, MEMBERSCOUNSEL: MICHAEL W. BADER for Respondent
APPLICANT - In Person

JUNE 21st, 1977

Applicant, 55 and a registered motor vehicle salesman since 1965, was the subject of a proposal of the Registrar to suspend his registration for 60 days for reasons set forth by him, substantially, that in a transaction of purchase and sale of a used motor vehicle Applicant had acted as salesman for or on behalf of a dealer to whom he was not registered, contrary to section 3 (i) (b) of The Motor Vehicle Dealers Act ("the Act"). It was furthermore alleged that in such transaction he had been a party to a scheme to deprive the Government of Ontario of retail sales tax properly exigible in such transaction. On the basis of the foregoing Registrar would have suspended Applicant finding reasonable grounds for a belief that Applicant would not carry on business in accordance with law and with integrity and honesty as the Registrar would be entitled to do under section 5 and 6 of the Act.

Applicant admitted carrying out the transaction complained of and that, in substance, he arranged the sale of a used automobile from a used car dealer other than the dealer with whom he was employed saying however he did it as a favour to a friend so that his friend's secretary could get a good deal. The deal however did not please the purchaser who complained that she had paid too much for an unsatisfactory vehicle which she had then to get rid of disadvantageously. The complainant testified that she thought she was dealing with Applicant's principal until she received a bill of sale from another dealer to whom her two cheques in payment were made out. She later noted a discrepancy of \$289.50 in favour of the vendor between the amount of her payments and the cost of the vehicle as per invoice.

Applicant testified that he had already lost his position with his employer as a result of the proposed suspension and had been unable to find new employment as a car salesman. He said he had only received \$50. for his trouble in the transaction. He now intended to accept employment outside the automobile industry and had asked for the hearing to clear his name.

The Tribunal found Applicant had acted for a motor vehicle dealer other than that with whom he was registered contrary to the Act and that Applicant and/or such motor vehicle dealer had defrauded the Province of Ontario of sales tax in the transaction complained of. The Tribunal noted that Applicant had an otherwise unblemished reputation in the industry and had suffered dismissal before the Registrar's proposal took effect. Respondent's counsel was agreeable to a backdating of any suspension ordered.

ORDERED: There will be retroactive suspension of registration for 60 days.

1 9 7 7

TORONTO

Mar. 30

JOHNSON MOTORS, ROSE JOHNSON
and SAMUEL JOHNSON

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C. and
ROBERT J. RUMBLE, MEMBERSCOUNSEL: DAVID WALLERSTEIN for Applicants
MICHAEL W. BADER for Respondent

MARCH 30th, 1977

Johnson Motors, in the person of Rose Johnson, was refused renewal of registration as a motor vehicle dealer which had been held continuously since 1965 although subject to terms and conditions since 1974. In his proposal to so refuse, the Registrar also refused renewal of salesman registration to Samuel Johnson, husband of Rose. The imposition of terms by the Registrar and consented to by the dealer-registrants was prompted by the fact that the Johnsons had twice been convicted of breaches of section 49 (now section 58) of The Highway Traffic Act prescribing the issuance of safety standard or mechanical fitness certificates on the transfer of used motor vehicles. The Registrar's refusals to renew now appealed from were based on allegations very fully set forth in his proposal together with supplementary particulars delivered to the Applicants. Briefly, the Registrar accused the Applicants of selling at least four used cars through a salesman who was not registered and the transactions were carried out in such a way that the purchaser in each case was ignorant of the fact that the dealership had legal, if not registered title, to the vehicles and in the process payment of retail sales tax was evaded and, in one case, a purchaser was misled by the "salesman" as to the true mileage of the vehicle being sold to him. In the supplementary particulars explicit details were furnished by the Registrar of seven transactions of sale of used vehicles purportedly by "private sale" from various nominees in the employ of the Applicants directly to innocent purchasers who remained unaware that Johnson Motors owned the vehicles being sold. In order to carry out these deceptions various signatures were forged to transfers and retail sales taxes due the Province remained unpaid. The Registrar accordingly proposed to refuse to renew

registration to Applicants as he was entitled to do so by section 6 of The Motor Vehicle Dealers Act by relying on the foregoing conduct of Applicants which gave rise in his mind to reasonable grounds for a belief that Applicants would not carry on business in accordance with law, integrity and honesty.

At the outset counsel for the parties advised the Tribunal that agreement had been reached by all parties whereby Applicants would be granted registration as dealer subject to terms and conditions including the posting and maintenance of a letter of credit in the amount of \$5,000. by way of penal sum payable to the Treasurer of Ontario whenever within three years there is a sustained proposal of the Registrar to refuse to renew or to suspend or to revoke the registration of the dealership for reasons connected with the sale of a motor vehicle by other than a duly registered salesman and conducted at a place other than its ordinary place of business and subject to good behaviour and permitted inspections.

A further agreement was reached respecting the granting of the desired salesman registration upon conditions including the restriction that sales of motor vehicles must be made in accordance with the Act and not to an unregistered salesman or from a place other than the dealer's ordinary place of business and subject to good behaviour.

ORDERED: As above.

BERTON C. KELLY

Aug. 30

Applicant
and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A., and
GRANT BROWN, MEMBERSCOUNSEL: APPLICANT in person
M. W. BADER for Respondent

AUGUST 30th, 1977

Applicant, a registered motor vehicle salesman, was the subject of a proposal by the Registrar to suspend his registration for one month for reasons stated to be that in two sworn affidavits made by Applicant in 1974 in conjunction with applications respectively for salesman registration and transfer of employment as salesman he had withheld information concerning his convictions for impaired driving in 1969 and possession of obscene matter for sale in 1973. Following a warning from the Registrar in 1974 in respect to the foregoing Applicant again in 1977 withheld information in the questionnaire supported by his affidavit as to the truth of his answers concerning three convictions under The Ontario Highway Traffic Act and Criminal Code, convictions for driving while impaired by alcohol, obstruction of justice, theft and possession of stolen property under \$200 in value, for non-appearance and three more impaired driving offences. The suspension proposed was expressed to be lenient because of Applicant's youth and potential future as a motor salesman.

Admitting the foregoing allegations Applicant pleaded that he would not have obtained good employment if he placed his record before his employers. He asked for a decision without reasons.

ORDERED: Suspension as salesman for one month confirmed and to be employed thereafter only by dealers approved by Registrar.

1977

TORONTO

Nov. 15

KITCHENER-WATERLOO CAR MARKET
and WILLI RAMMINGER

Applicants

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C. and
G. DEAN MYERS, MEMBERS

COUNSEL: A. N. MAJAINA for Respondent

NOVEMBER 28th, 1977

Applicants recently registered as motor vehicle dealer and salesman (the latter as sole proprietor of the former) required a hearing pursuant to section 7 of The Motor Vehicle Dealers Act ("the Act") for review of the Registrar's proposal to revoke both registrations. The Registrar's reasons, fully stated in his proposal, contained allegations of breaches of the Act by Applicants in displaying and offering vehicles to which Applicants did not hold title and by advertising such vehicles under a name other than that of the dealer's registered name contrary to section 3 of the Act. Registrar further alleged the Applicant dealer had issued an N.S.F. cheque for \$5,800. in a transaction of purchase of two used vehicles from a motor vehicle dealer and that the Applicant dealer had improperly refused to return a deposit of \$20. received from a member of the public. For these reasons and the refusal to co-operate in supplying answers to Registrar's queries the Registrar found Applicants wanting in financial responsibility and guilty of past conduct indicating they would not carry on business in accordance with law and with integrity and honesty. Registrar further alleged Applicant dealer was in breach of terms or conditions imposed on its registration in breaches of section 13 of the Regulations under the Act.

Applicants did not appear at the hearing nor were they represented although due notice to them of the proceedings was found to have been given.

Evidence before the Tribunal indicated there had been negotiations over a period of several months between Applicants' solicitors and the Registrar over Applicants' desire to operate a "private car market" on a used car lot where private car owners could rent space for display and sale of vehicles they wished to sell by private treaty. Ramminger had caused a corporation to be incorporated with such objects and proceeded to operate and advertise such services over the objections of the Registrar that they were in breach of section 3 (3) of the Act. The Applicant dealer had become registered under the name Kitchener-Waterloo Car Market although the incorporated company "Kitchener-Waterloo Private Car Market Limited" continued to operate and advertise under the latter name without registration in such name contrary to the Act. Although notified of the illegality of the operation Applicants did not alter their business methods and a check of 22 vehicles on Applicants' car lot indicated only two were registered to the Applicant dealer. The above allegations regarding the issue of a bad cheque and the unjustified refusal to refund a deposit were proved. Judgements against Applicants in both cases had been obtained and remained unsatisfied. There was further evidence that the Applicant Ramminger had been convicted of the breach of city by-laws in creating unduly noisy disturbances and in operating from non-approved premises. The Tribunal's findings were that Applicants had issued cheques without funds to cover, that Applicants had operated in defiance of section 3 and Regulation 13 (3) (c) of the Act, that Applicants had contravened section 22 of the Act in refusing to furnish information reasonably requested by the Registrar. In the result the Tribunal concluded Applicants could not reasonably be expected to be financially responsible in conducting business and that their past conduct afforded reasonable grounds for a belief that such business would not be carried on in accordance with law and integrity.

ORDERED: Registrar will carry out his proposals to revoke the registrations.

1977

LONDON

TRIANGLE AUTO MART and
DONALD JOHN KOWTALUK

Sept. 15 & 16

and Applicants

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and
THOMAS WOOD. MEMBERS

COUNSEL: APPLICANT - in person
M. W. BADER for Respondent

OCTOBER 21st, 1977

Applicant Kowtaluk, a registered motor vehicle salesman and sole proprietor of Triangle Auto Mart ("Triangle"), a registered motor vehicle dealer were the subjects of a proposal by the Respondent Registrar to suspend both registrations for three months. Such proposal alleged wrong-doing by the Applicant in a series of used car purchases involving the complicity of the sales manager of a well-known and respected franchised dealer in Ingersoll, 30 miles from the Applicant's place of business in Delhi. It was alleged with supporting facts that Applicant was able to purchase advantageously a number of used cars received in trade by the franchised dealer through the co-operation of its sales manager who apparently accepted an "under the table" bribe with the completion of each transaction. An investigation carried out under the Registrar's powers of inspection indicated suspicious sales records kept by Applicant and when called to a meeting with the Registrar to discuss these, Applicant offered explanations and denials unsatisfactory to the Registrar. Applicant required a hearing into the proposed suspensions, appearing on his own behalf.

Copies of bills of sale and other records in the handwriting of the Applicant which had been obtained by the inspector from Applicants' place of business indicated a series of five used car purchases by Applicant from one dealer between April and August 1976. Each bore a notation either "Com. D.C." or "Sales comm. D.C." followed in each case by a sum of money of between \$100 and \$200. When the Inspector inquired of Kowtaluk as to the meaning of these notations he was told the letters D.C. referred to delivery charges paid to one David Christie, sales manager at the material times of the Ingersoll dealer.

The Inspector admitted finding only a small number of such cases considering there were over 600 entries in the garage register of Triangle indicating an active turnover. The Inspector found Kowtaluk to be co-operative.

A new car customer of the Ingersoll dealer testified to "turning in" a used Cortina as part of the purchase price of a new car being allowed \$586. by the sales manager Christie who received from the customer both the Cortina and unsigned transfer on June 19th. When shown the transfer of the Cortina directly from her name to Triangle the customer denied having signed her name to it. The Ingersoll dealer testified that the Cortina was not at any time recorded in his inventory or garage register nor did the register record the sale to Triangle. A bill of sale of the Cortina from Triangle to a third party for \$800 was produced. On learning of this and another similar irregularity the dealer fired Christie whereupon Kowtaluk approached the dealer to settle for the Cortina and a 1971 Meteor neither of which were recorded in the dealer's inventory or garage register. The dealer produced bills of sale of vehicles sold by his dealership to Triangle which suspiciously differed in some respects from the "duplicate" copies therof from Triangle's records. The Ingersoll dealer did not know Kowtaluk in a business way and learned of his manager's dealing with him when a number of irregularities showed up in his used car department which sustained substantial losses in 1976 over 9 months during which period some 25 used car sales were made to Triangle on a wholesale basis.

Kowtaluk, 31, denied having "paid off" Christie and swore that the initials D.C. beside sums of money in his handwriting in bills of sale and other of his records stood for "direct charge or direct cost" and that "Com" should be read as "con" standing for 'conditioning'. He claimed to have paid Christie \$200 cash for the Cortina entering it in his garage register on June 17 although he did not receive the vendor's signed transfer until June 21st. He denied conspiring with Christie. He said the customers who had purchased some 600 vehicles were satisfied and without complaints against him.

The Tribunal chose not to accept Kowtaluk's version of the facts or his explanations for the abbreviations "com" or "D.C." opposite sums of money in his own handwriting finding that D.C. stood for David Christie, the Ingersoll dealer's sales manager, and that the sums of money opposite were indeed commissions paid to Christie for favours and included in its finding that one bill of sale from Triangle's records had been fabricated. There had been a conspiracy between Kowtaluk and Christie to defraud Christie's employer.

ORDERED: The proposed suspension for three months of dealer and salesman is confirmed, to commence December 1, 1977. Kowtaluk is warned to assure in future the keeping of detailed conditioning records.

1 9 7 7

TORONTO

Jan. 4

BERT KUEHNE

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL:

J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C. and
ARTHUR D. SISLEY, MEMBERS

COUNSEL:

GEORGE A. WOOTTEN, Q.C., for Applicant
A. N. MAJAINA for Respondent

JANUARY 18th, 1977

Applicant, on being refused registration as a motor vehicle salesman by the Registrar (Respondent), required a review of the latter's action in so refusing him pursuant to section 7 of The Motor Vehicle Dealers Act ("the Act"). The Registrar's refusal was by notice of proposal to the Applicant which set forth a history of Applicant's career as salesman since he first became registered in June, 1969 and, as grounds for such refusal, that he had answered questions in his application untruthfully or, at least, carelessly, that he was an undischarged bankrupt and that he had failed to explain his part in a transaction of sale of an automobile to his dealer's satisfaction. The Registrar found grounds for a belief that Applicant lacked financial responsibility and would not conduct business lawfully and with integrity and honesty, both grounds for refusal by section 5 of the Act.

The parties through counsel indicated a wish to proceed by way of section 4 (c) (ii) of The Statutory Powers Procedure Act through agreement reached between them to dispose of the proceedings without a hearing. The Tribunal complying, it ordered registration to be issued to the Applicant at a time when his circumstances have changed and he has been discharged from bankruptcy.

ORDERED: As above.

TORONTO

Feb.10

VINCENT D. PIZZATI

Applicant

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and
KENNETH J. HALNAN, MEMBERS

COUNSEL: A. N. MAJAINA for Respondent

FEBRUARY 10th, 1977

Applicant required a hearing pursuant to section 7 of The Motor Vehicle Dealers Act ("the Act") when refused registration as a motor vehicle salesman by the Respondent Registrar communicated to Applicant by his Notice of Proposal with fully stated reasons. Although duly notified of the time and place of the hearing Applicant did not attend nor was he represented. The Tribunal's notice of hearing, which was mailed to the Applicant by registered and ordinary mail at the address he had furnished in his application for registration more than one month before the date appointed for the hearing, contained the warning that, following due notice thereof, if a party does not attend, the Tribunal may proceed with the hearing without further notice pursuant to section 7 of The Statutory Powers Procedure Act, 1971.

The Registrar's reasons for refusal of registration were 1) that Applicant had given a false reason for the loss of his real estate broker registration in November, 1974; 2) that Applicant was, at the time of his application, and still is, an undischarged bankrupt; and 3) that Applicant had denied, in his application, any past criminal convictions whereas he had been convicted in March 1976 of stealing property of a value in excess of \$200. The Registrar found such conduct to be inconsistent with financial responsibility and that he would not carry on business in accordance with law and with integrity and honesty as set forth in section 5 of the Act.

The Tribunal having received evidence in support of the Registrar's allegations as above-stated, found such allegations proved.

ORDERED: The Registrar's refusal to register is sustained.

TORONTO

Dec.19

CIVIC TOWER LIMITED

Applicant

and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and
JOHN HURLBURT, MEMBERS

COUNSEL: RICHARD H. DONALD, Q.C., for Applicant
BRIAN M. CAMPBELL for Respondent

DECEMBER 19th, 1977

Applicant was refused registration under The Ontario New Home Warranties Plan Act, 1976 ("the Act") by a decision of the Registrar invoking section 7 (1) (c) of the Act which provides that a corporation applying is entitled to registration except where:

"(c) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings"

The Registrar, in stating his grounds for such refusal, found the financial statement of the Applicant submitted with its application indicated a deficit and that requested guarantees had not included personal net worth statements of the principal shareholders.

At the hearing material filed included a recent auditors' report on the corporation's position indicating a small net deficit. On the other hand comprehensive personal guarantees of the principal shareholders in favour of the corporation on the standard form required by the Registrar had been provided. The principals however objected to supplying statements of personal net worth to back up such guarantees. Four residential units were under construction or in contemplation.

Counsel for the parties requested an oral decision without reasons.

ORDERED: The Registrar shall grant registration to Applicant upon being furnished by the principals with a \$10,000 surety or cash bond or bank letter of credit.

TORONTO

Nov. 9

MASTRANGELO DEVELOPMENTS LIMITED

Applicant

and

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT, 1976

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and
LOU RICE, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

NOVEMBER 9th, 1977

Applicant required a hearing to review the proposal of the Registrar to revoke its registration under The Ontario New Home Warranties Plan Act ("the Act") on the ground that, having regard to its financial position, Applicant could not reasonably be expected to be financially responsible in the conduct of its undertakings because it was in bankruptcy.

Applicant was not represented at the hearing as no one appeared although the opening was delayed one half hour. Due service upon Applicant of the notice of hearing was shown to have been made which included a warning that, in the event of the non-appearance of Applicant, the Tribunal may proceed nevertheless and without further notice to the Applicant.

The party appearing did not request reasons for its decision from the Tribunal and accordingly, following consideration of the evidence and representations by counsel for the Respondent Registrar, the Tribunal found Applicant not to be in a financial position to carry on as a registered builder of new homes nor financially responsible in the conduct of its undertaking by reason of its bankruptcy.

ORDERED: The Registrar shall carry out his proposal to revoke Applicant's registration.

1 9 7 7

TORONTO

Dec. 20

PEREIRA CONSTRUCTION COMPANY

Applicant

and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and
LOU RICE, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

DECEMBER 20th, 1977

Applicant, a sole proprietorship of Marcel Pereira, having received notice of the Registrar's proposal to revoke its probationary registration under The Ontario New Home Warranties Plan Act ("the Act") required a hearing pursuant to section 9 of the Act. The Registrar had based his decision on the ground that Applicant's financial position indicated it could not reasonably be expected to be financially responsible. The Registrar has cited the fact of the personal bankruptcy of Marcel Pereira.

Applicant did not appear nor was it represented at the hearing although due service upon Applicant of the Tribunal's notice of hearing was found to have been given. The opening was delayed one half hour while efforts to reach Applicant were made without success.

Evidence before it satisfied the Tribunal of Pereira's bankruptcy. Counsel for the Registrar requested an oral decision without reasons.

ORDERED: The Registrar shall revoke the Applicant's registration.

1977

KENNETH JEFFERSON TREADWAY

TORONTO

Applicant

Oct. 24

and

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT, 1976

Respondent

TRIBUNAL: H.F.H. SEDGWICK, VICE CHAIRMAN as CHAIRMAN
W. W. EVANS, C.A. and
JOHN HURLBURT, MEMBERS

COUNSEL: R. STIKEMAN for Respondent

NOVEMBER 30th, 1977

Applicant required a hearing under section 9 of The Ontario New Home Warranties Plan Act, 1976 ("the Act") in response to the Registrar's proposal to suspend his probationary registration status under the Act. Applicant did not appear at the hearing nor was he represented. Due service of the Tribunal's notice of hearing upon the Applicant was shown to have been effected which included a warning that in such cases the Tribunal may, in the absence of the Applicant, proceed to hold a hearing without further notice to him.

Evidence offered by the Registrar indicated Applicant had tendered two small cheques to the Registrar in May and June, 1977 which had not been honoured. Replacement cheques were later furnished and accepted as new home registration fees although as late as July 22nd Applicant had not been accepted as a registrant. Requested statements as to Applicant's personal net worth as at the end of 1976 indicated a net worth of \$34,390. and demand loans outstanding aggregating \$87,200. which were secured. Evidence collected by questionnaire from several of the purchasers of new homes completed by Applicant were not in the Tribunal's view conclusive as indicating proven complaints of unsatisfactory workmanship or lack of attention on Applicant's part.

Tribunal found Applicant had not become registered and hence could hardly be subjected to suspension of probationary registration. In fact the Tribunal could find no provision in the Act for the status of "probationary registration". The Tribunal also found difficulty in the concept of suspension without a stated term and none had been proposed by the Registrar. In the result, because Applicant had not become registered, the proposal to suspend was unacceptable, and is set aside.

ALLEN FRANK ARNOLD and
RAYMOND FRANK WILSON

TORONTO
Aug. 12

Applicants
and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS ACT
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and
J. VOORTMAN, MEMBERS

COUNSEL: AUSTIN M. COOPER, Q.C., for Applicant
A.N. MAJAINA and THOMAS LEDERER
for Respondent

REHEARING - AUGUST 19, 1977

The Divisional Court, Supreme Court of Ontario, on appeal by the Respondent Registrar, referred this matter back to the Tribunal for a re-hearing as to the penalty only applied by the Tribunal in its decision of September 3, 1975* following a nine day hearing. Hughes, J. stated in the majority judgement of the Court that the conditions of good behaviour imposed by the Tribunal for one year had the appearance of probationary provisions and as such were unlawful as being not sanctioned by the Real Estate and Business Brokers Act. The Court directed the Tribunal, if it considered it was imposing penalties upon the Applicants by the conditions it had made applicable to their behaviour for one year, to re-consider and apply a suitable penalty with the illegal conditions vacated.

The Tribunal, considering such conditions were intended as penal, following the conclusion of argument as to a suitable penalty, ordered suspensions of registrations for four months in substitution for its earlier order imposing two months suspension.

ORDERED: The broker registration of Applicant Arnold and the salesman registration of Applicant Wilson shall each be suspended for four months commencing September 15, 1977.

* See Volume 4 - Summaries of Decisions p. 23

TORONTO

Dec. 12,

14 & 15

ROBERT LESLIE DEVERS

Applicant

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
MAURICE S. LAMOND, MEMBERS

COUNSEL: APPLICANT - in person
A.N. MAJAINA for Respondent

JANUARY 30th, 1978

Applicant, who had an extensive background in real estate in Toronto having been a registered salesman for six years before becoming a registered broker for ten years, was refused registration as a salesman when re-applying after a lapse of several years. In his lengthy proposal to refuse the Registrar furnished detailed reasons for his opinion that Applicant was disentitled to registration under section 6 of The Real Estate and Business Brokers Act ("the Act") by reason of his past conduct, a lack of financial responsibility and that he was carrying on activities that, if he became registered, would put him in contravention of the Act. Applicant required a hearing pursuant to section 9 of the Act and appeared on his own behalf throughout the hearing.

The subject application was received by the Registrar on July 7, 1977 whereupon he advised the Applicant that before he could give consideration to it he would require further information and material verified by affidavit and specifically an accounting from Applicant "of all.. moneys...received (by Applicant) in the name of Spire Investments and disbursements made (by Applicant) in connection with this company". Registrar, in putting forward such demand, relied on section 13 (15) of the Regulations to the Act although apparently no particulars were wanting in the application before him. The Registrar was not satisfied with whatever information Applicant was able to supply and renewed his demand for an accounting and financial reports on Spire although it appeared the books and records of this company were in the hands of a trustee who refused co-operation to the Applicant. In his 30 page notice of proposal dated September 8, 1977, Registrar advised Applicant of his

efusal citing a number of reasons including: 1) Applicant in his sworn application testified there were no outstanding judgements against him whereas there was at least one judgement against him personally and there were several against L. Devers Limited a company entirely owned by him, all outstanding at the time of his deposition; 2) that he had not disclosed in his application an undefended suit in the Supreme Court of Ontario against Applicant and 23 other defendants, both individual and corporate, by the trustees of Spire Investments on behalf of all members thereof claiming \$1,000.000 in general and punitive damages arising from alleged fraudulent conversion of the property of a trust while he was a trustee with others of the defendants and from various breaches of trust resulting in losses of approximately \$447,000 to the members; 3) that in reply to a question in his application inquiring as to convictions for criminal offences or criminal proceedings then pending against him Applicant replied in a side confidential memorandum that a preliminary hearing into unsubstantiated criminal charges was pending; 4) that Applicant has failed or neglected to supply the information demanded by the Registrar referred to above; 5) that Applicant had fallen short of making full disclosure in various applications for renewal of his real state brokerage licence in 1974; and 6) that Applicant had conducted trades in real estate through his wholly-owned corporation which was not registered as real estate broker contrary to the act.

Evidence before the Tribunal established that Applicant as 60, had one dependant and was in receipt of a war pension, that he had left Canada in April 1975 returning voluntarily in June 1977, that he was charged in August 1975 with criminal fraud hereby Spire Investments and a member were deprived of \$573,000 and criminal breaches of trust and failure to account, contrary to the Criminal Code of Canada. He had voluntarily surrendered his broker registration in April 1975 thus terminating a brokerage partnership of two incorporated companies, one owned by one Allan and his own corporation R. L. Devers Limited ("Devers Limited"). In 1973 Applicant had incorporated another Ontario company called R.L. Devers Holdings Limited ("Devers Holdings") wholly-owned and which had as its undertaking "business and financial management of associated companies". Inquiries by the Registrar in 1973 concerning the activities of Devers Holdings and Applicant's involvement, produced a reply from its manager listing 12 enterprises managed by Devers Holdings in which Applicant held less than 100% equity and Devers Limited, 00% owned by him.

Early in 1965 by declaration of trust executed by the senior proprietors of E. W. Dempster Real Estate including Applicant and an annually elected ordinary employee of the firm, four in number, were constituted trustees of a fund to which

employees of the firm might contribute, on a monthly basis, in units of \$10. The purpose apparently was to create an investment fund available for real estate investment opportunities as occurring. Thus was begun Spire Investments, an open-ended trust so informally arranged that the only evidence of an investors interest was in the books of the trust and interest was paid from time to time. Applicant was the leading spirit and directed its affairs and the books were kept by him or under his direction. Apparently little financial information was available to members, no audits were performed and regular meetings were not held. Word of the plan spread among a pentecostal religious community in which Applicant was active so that by the end of 1974 there were some eighty unit holders. By the end of 1975 when the first financial report was prepared for presentation to the unit holders in their first meeting it was revealed their invested equity of some \$883,000 had unaccountably shrunk to \$419,000 between 1968 and 1974 through losses in investments and loans, a state of affairs which gave rise to the replacement of the trustees by new trustees who now sued Applicant as above mentioned and to the criminal charges pending against Applicant as above mentioned. Substantially the loans had been to companies and enterprises with which Applicant was associated and which had not prospered. There was evidence of "mortgage loans" on the books "secured" by non-existent municipal property

Although Applicant, testifying in his own behalf, denied that he had personally "borrowed", much less stolen, money from Spire, allegations were made of loans to members of his family. Substantial investments by Spire in Devers Holdings had been reinvested in English real estate and importing enterprises and in which Applicant held substantial interests. Such investments were totally wiped out and Applicant blamed his English partners for misleading him. He denied having knowledge of judgements against him when he produced his sworn depositions in his application. He denied wrong doing of any kind and was certain the criminal charges would not be made out against him. He said he was of the view that as a trustee of Spire he had no higher duty than to manage, with the other trustees, the fund entrusted to them in the best way possible and that, at most, he was guilty of errors in investment judgement. As for the loans to himself and members of his family he had the unfettered right to make such loans and intended to repay them himself and to that end wished to be gainfully employed as soon as possible. He denied intentionally misleading the Registrar in any instance. He admitted directing moneys received for Spire directly to the English enterprises as loans which he insisted were all recorded in Spire's books, a fact not readily confirmable since the books were not produced from the hands of the new trustees and/or the police. Applicant refused to answer questions about the mortgage "loans" on non-existent municipal properties and the Tribunal refused to compel him.

The Tribunal's findings were that Applicant had deposited falsely in his application contrary to section 63 (1) (a) of the Act; that Applicant had no justification for refusing additional information demanded by the Registrar, a breach of section 3 (15) of the Regulations to the Act; that Applicant had converted to his own use funds of the Spire Investment trust and improperly invested substantial funds therefrom in ventures in which he was personally financially interested in breach of his fiduciary capacity as a trustee of Spire, and contrary to the declared wishes and interests of the unit holders thereof; that he failed in his duty as such trustee to keep proper records and to produce such records as there were to the duly constituted trustees when required; that Applicant is wanting in financial responsibility as witness the substantial judgements against him, is having issued n.s.f. cheques and his present impecunious situation. Accordingly, Applicant's past conduct afforded the Registrar reasonable grounds for the belief that he would not carry on business in accordance with law, integrity and honesty and that, having regard to his financial position, he could not reasonably be expected to be financially responsible in the conduct of business.

ORDERED: The Registrar shall carry out his proposal to refuse Applicant registration as a salesman.

A. ORGAN REAL ESTATE LIMITED
and ALBERT ORGAN

and

Applicants

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN J. MORNINGSTAR and
MRS. SADIE MORANIS, F.R.I.,
MEMBERS

COUNSEL: ALBERT ORGAN - Applicant in person
A.N. MAJAINA - for Respondent

MAY 10th, 1977

Applicants, both real estate brokers, the former registered since 1968 and the latter since 1965, were the subject of a proposal by the Registrar to revoke their registrations under section 8 of The Real Estate and Business Brokers Act ("the Act") express based upon his opinion that, having regard to their financial position, they could not be expected to be financially responsible in the conduct of their business and that their past conduct was such as to afford reasonable grounds for belief that they would not carry on business in accordance with law and with integrity and honesty. The Registrar's proposal, fully supported by particulars, also alleged that the Applicants were presently and prospectively in breach of the Act and Regulations thereunder. Such particulars included details of various substantial court judgements and executions against Organ, A. Organ Real Estate Limited wholly-owned by him, and several other incorporated companies wholly-owned by him. Notwithstanding the existence of such judgements and executions against the Applicants, Organ as President of the broker A. Organ Real Estate Limited and in respect of his personal capacity as broker, had consistently failed to disclose such as required in annual renewal applications sworn to by his affidavit as being true. It was further alleged that both Applicants failed to keep or use proper trade record sheets in recording transactions contrary to section 30 of the Act. The Registrar found fault with Applicant Organ in failing to inform the Registrar as required of the existence of numerous incorporated companies he used for trading purposes contrary to section 3 (1) (c) of the Act. Registrar further alleged breaches of section 42 of the Act in the matter of disclosure of his interest when, as the true purchaser, Organ caused incorporated companies under his control to enter into agreements for the purchase of land.

here was a further allegation of breaches of section 43 (3) of the Act requiring the true date of signing to be affixed at the same time as the signature in agreements for the sale of land. It was also alleged Organ had failed to perform undertakings he had given in writing to the Registrar and to supply information properly required under the Act contrary to Regulation 13 (15) under the Act. Applicant Organ, 53 years of age, having a wife and two dependants and the incorporated brokerage required a hearing.

Evidence adduced on Respondent's behalf established each of the above allegations without challenge except that the extent of a bank's execution against Applicants was considerably less (\$136,400.) than as alleged (\$467,900.) and that one judgement against a wholly-owned company was no longer outstanding. Organ said he had been unable to supply financial information demanded by the Registrar on grounds of his impecuniosity. The principal activity of the Applicants had been in land assembly of 1,000 acres for one Bernick and Organ had a company incorporated separately for each transaction to conceal the single purchaser's identity. Although commissions amounting to \$268,632 had been earned, the success of his operations depended on rapid redevelopment of the land which had not occurred. Lacking liquidity Organ had submitted to default judgements against himself, his brokerage company and corporate shells. Concerning the various technical breaches of the Act he said they were done unwittingly. Regarding the failure to observe an undertaking he gave to the Registrar in July 1973 to confine his activities to his real estate brokerage business and not to continue to enter into transactions as both principal and agent, he offered no explanation.

On the evidence the Tribunal concluded the past conduct of the Applicants indicated a lack of financial responsibility in the conduct of their business and was such as to afford reasonable grounds for a belief that they would not carry on business in accordance with law and with integrity and honesty.

ORDERED: The Registrar shall carry out his proposal to revoke Applicants' registrations; the Tribunal added its recommendation urging the Registrar to favourably consider granting Applicant Organ registration as a salesman if asked.

RUDOLPH TRAVEL SERVICE LTD.

TORONTO

Applicant

Nov. 28

and

BOARD OF TRUSTEES OF THE COMPENSATION FUND UNDER
SCHEDULE OF THE REGULATIONS MADE UNDER THE
TRAVEL INDUSTRY ACT, 1974

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and
LISA PERELL, MEMBERSCOUNSEL: APPLICANT in person
MICHAEL D. LIPTON for Respondent

DECEMBER 12th, 1977

Applicant, a registered travel agent, made a claim through the Board of Trustees upon the Compensation Fund pursuant to section 15 of the Schedule of the Regulations under The Travel Industry Act ("the Act") on account of two advance deposits amounting to \$600. It had received from clients and forwarded to a travel firm to secure advance booking charter flights to Trinidad. Within days of receiving such advances the travel firm ceased operations at the same time indicating its inability to return same, whereupon Applicant made good the amount of their clients' deposits no doubt expecting reimbursement from the Compensation Fund as expressly provided in section 15 (2) of the Schedule in the case of travel agents who choose to reimburse their clients at their own expense for funds innocently received and passed to a travel wholesaler. The Schedule however provides that such travel agent and travel wholesaler must both be "participants" in the Fund and further, in section 3, that to be eligible as participants travel agents and travel wholesalers must be registered under the Act. In fact the travel firm receiving the advance deposits from the Applicant travel agent which it found itself unable to return was, at the time of such receipt, registered only as a travel agent but not as a travel wholesaler. Accordingly, the decision of the Board of Trustees was that Applicant's claim for reimbursement was not eligible. Applicant required a hearing under section 15a of the Schedule.

The evidence before the Tribunal bore out above facts and that indeed the travel firm carrying on the business of travel wholesaler was not at any time so registered and as such not an eligible participant - a fact fatal to Applicant's claim.

ORDERED: Applicant's claim for reimbursement from the Compensation Fund is disallowed.

1 9 7 7

MARIO SCONZA

TORONTO

Applicant
and

Nov. 28

BOARD OF TRUSTEES OF THE COMPENSATION FUND UNDER
SCHEDULE OF THE REGULATIONS MADE UNDER THE
TRAVEL INDUSTRY ACT, 1974

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and
LISA PERELL, MEMBERS

COUNSEL: MICHAEL D. LIPTON for Respondent

NOVEMBER 28th, 1977

Applicant's claim for payment of \$1,134.00 from the Compensation Fund constituted under The Travel Industry Act ("the Act") was disallowed by the Board of Trustees proceeding under section 15 (1) I. of the Schedule of the Regulations under the Act as it then appeared and before amendment by O.R. 805/77 on November 1, 1977. In its notice of refusal of Applicant's claim the Board took pains to point out that the Fund was, in its opinion, to be administered in favour of clients of participants who had paid for, but had not received, certain travel services but it was not, in the Board's view, intended to benefit clients of qualified participants receiving alternative travel services however lacking such services may have been in quality or extent. Applicant required a hearing by the Tribunal in accordance with section 15 (a) of the Schedule of the Regulations under the Act for a review of such disallowance.

Applicant failed to appear at the hearing, nor was he represented, although the opening was delayed thirty minutes. The service of the Tribunal's notice of hearing was proved which contained a warning to Applicant that if he failed to appear the matter would be heard and proceedings taken without further notice to him.

Evidence of the Board's refusal of Applicant's claim was received and, in the absence of other evidence, the Board's decision was sustained.

ORDERED: Applicant's claim is disallowed.

D. E. STEVENSON

Applicant

and

BOARD OF TRUSTEES OF THE COMPENSATION FUND UNDER
THE TRAVEL INDUSTRY ACT, 1974

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W.W. EVANS, C.A., and
GORDON GIRVAN, MEMBERSATTENDANCE: APPLICANT in person
M. F. LEHNER, Acting Chairman of
the Board of Trustees - in person

SEPTEMBER 12th, 1977

Applicant had paid \$1,044. to Runaway Travel Limited ("Runaway") to prepay for a package tour offered and operated by Excelsior International ("Excelsior") from Toronto to Rio de Janeiro for 12 days for a special Carnival programme in February 1977. Runaway and Excelsior were respectively registered travel agent and wholesaler under The Travel Industry Act, 1974 ("the Act") and hence were eligible participants in the Compensation Fund established under the Schedule to the Regulations made under the Act and, as it happened, not otherwise exempted. In March 1977 following his return from Rio Applicant presented a claim on his own account to Excelsior and Runaway for an adjustment by way of refund of part of his expense by reason of substandard hotel accommodation supplied, the failure to make good on a promise of full Brazilian breakfast each morning and out-of-pocket taxi fare. His claim having been rejected by Runaway he applied to the Board of Trustees of the Compensation Fund for reimbursement and was refused on the ground that claims based on quality alone were not, in their judgment, eligible. Applicant thereupon required a hearing by the Tribunal under sections 15 and 15 (a) of the Schedule to the Regulations made under the Act.

Applicant based his claim for refund on the apparent failure of the tour operators to supply a room for 12 nights in a first class hotel in Rio and a daily Brazilian breakfast. Testifying, Applicant described his hotel for one night as "seedy and old" and, after transferring himself at his own expense, for two nights, his room in a presumably less than first class hotel as "resembling a good sized walk-in closet".

No Brazilian breakfasts materialized. He was considerably put out on comparing his accommodation with those of other persons on the same trip.

Applicant claimed that Runaway had accepted his specification of a certain hotel in Rio and produced his cancelled cheques to the travel agent endorsed on their backs "I Stevenson Rio Feb/12 Olinda" the last being his preferred hotel. Applicant testified that Runaway represented by its owner had assured him of confirmed space in the Olinda for 12 nights. No evidence was offered on behalf of the Board of Trustees, choosing instead to argue that section 15 subsection 1 of the Schedule did not give the travel agent's client a claim to compensation for shortfalls between the quality of that which was offered and that obtained.

The Tribunal, accepting Applicant's uncontested evidence, assessed his claim at \$195.

ORDERED: The Trustees of the Compensation Fund shall pay the Applicant \$195. in full satisfaction of his claim.



CA26N
CC 40
- C56

Summaries
of Decisions
Volume 7



Commercial Registration Appeal Tribunal

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

SUMMARIES OF DECISIONS - VOLUME 7

These are summaries of all decisions and reasons given following hearings in 1978.



Published pursuant to the Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario 1970, Chapter 113.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL

TABLE OF CASES SUMMARIZED

<u>APPLICANTS</u>	<u>Page</u>
<u>Bailiffs Act</u>	
Stewart, William R.	1
<u>Business Practices Act</u>	
Coulter, Peter F.	3
F.K. Products	3
Filter King	3
Lombardo, Antonio	6
Lombardo, Lodia	6
<u>Consumer Protection Act</u>	
Elican Aluminum Manufacturing Ltd.	8
Marsala, Pasquale	10
Villa Paving Asphalt & Concrete Co.	10
<u>Motor Vehicle Dealers Act</u>	
Buset, Louis J.	14
Dupuis, Michel	12
LOH Expeditors Inc.	14
Hunt, Lloyd O.	14
Loitsch, Fritz K.	16
Penn Auto Sales	16
Webster, Peter W.	18

APPLICANTSPageOntario New Home Warranties Plan Act

338570 Ontario Limited	20
Brierwood Construction Limited	21
Campbell Construction	22
D'Alberto Construction Limited	23
Bruce Delaurier Construction	25
Falconhurst Construction (Oakville) Limited	26
Fincup Holdings Limited	29
Highlene Building Corporation Limited	31
Karatsoresos Construction	33
Ken-Ward Homes Limited	35
Shutt Contractors Limited	36
Thompson, Frederick G. (Mr & Mrs.)	37
Timcor Leaseholds Limited	39
Trevor Evans Developments Limited	41
Universal Construction	43
Vander Linden, Antonius	44
Vanderschaaf Construction Limited	45
Vecchio, Ralph	47
Heinz Wahl Construction Limited	49
Welsby (Helen) Construction	50

Real Estate and Business Brokers Act

Aylward, Peter William	52
Bezemer, Peter L.	54
Bezemer (Peter) Real Estate Inc.	54
Castiglione, Joseph	56
Dial M.S. Real Estate Limited	58
Foster, Gerald M.	62
Hacking, Harold Sydney	64
Hacking, Kenneth William	64
Hacking (S.D.) Realty Ltd.	64
Hacking, Susan Darlene	64
Heskamp, Walter Herman	66
Lombardi (E) Realty Limited	70
Lombardi, Edward	70
Mitro, Nicholas Sterjo	72
Sconza, Mario	58
Van Woelderden, Robert	75

<u>APPLICANTS</u>	<u>Page</u>
<u>Travel Industry Act</u>	
Canada World Youth	77
Jeunesse Canada Monde	77
Vanda Beauty Counsellor	79

1978

TORONTO

Nov. 9

WILLIAM R. STEWART

Applicant
and

REGISTRAR OF COLLECTION AGENCIES

Respondent

TIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C., and
NORMAN R. MCKAY, MEMBERSCONSEL: PETER J. WILEY for Respondent
APPLICANT - in Person

NOVEMBER 30th, 1978

Applicant, a bailiff appointed under The Bailiffs Act ("the Act") (as distinguished from a bailiff appointed under The Small Claims Courts Act and Sheriff's bailiff) received notice of proposal to revoke his registration from the Registrar of Collection Agencies, the proper official designated by the Act. The Registrar was explicit in his reasons for his proposal to revoke alleging misbehaviour in that Applicant had, while acting under due authority to seize a motorcycle from a certain person, carelessly or maliciously seized the motorcycle of another person. It was further alleged Applicant had, without authority and while representing himself as a "County Bailiff", attempted to collect a debt. It was further alleged by the Registrar that Applicant had, using threats of seizure of chattels and while not in possession of a lien warrant, attempted to collect debts.

Evidence presented by the Registrar proved the above allegations. In his own defence Applicant stated his work as bailiff was performed while on sick leave due to injury received at his regular occupation as a checker with Ontario Breweries Warehouse. He admitted not knowing the nature of a lien warrant and that he was unfamiliar with the provisions of The Costs of Distress Act and the nature of a power of seizure and sale. He expressed his opinion that the scale of costs prescribed under The Costs of Distress Act was inadequate to compensate for a bailiff's time and trouble.

The Tribunal found Applicant to be incompetent to act as a bailiff under the Act, that he had not acted in compliance with the Act of which he had little comprehension, and had contravened The Collection Agencies Act.

ORDERED: The Registrar shall carry out his proposal to revoke.

BBA 59

1 9 7 8

TORONTO

PETER F. COULTER carrying on
 business as F.K. PRODUCTS, F.K.
 PRODUCTS and a corporation carrying
 on business as F.K. PRODUCTS and/or
 FILTER KING

June 13, 19
 Sept. 6, 7, 13,
 14, 26 & 28
 Oct. 3 & 4.

Applicants

and

DIRECTOR OF CONSUMER PROTECTION DIVISION

Respondent

TIBUNAL: H.F.H. SEDGWICK, Vice Chairman as Chairman
 HELEN MORNINGSTAR and CAMERON C. HILLMER,
 MEMBERS

COUNSEL: PETER J. WILEY for Respondent
 PETER F. COULTER in Person

NOVEMBER 10th, 1978

By proposal pursuant to section 6 of The Business Practices Act, 1974 ("the Act") the Director proposed to order compliance with section 3 of the Act in respect to unfair business practices alleged and specified in his order directed to Applicants. Applicant Coulter as F.K. Products carried on the business of marketing the Malpassi Filter King Fuel Pressure Regulator ("the Filter King") - a supplementary gasoline filter and pressure regulator for installation as an "add-on" device on automotive engines already equipped with carburetor and fuel pump systems. The Filter King, imported from Italy, had a Canadian patent and Coulter apparently held sole distributing rights in the Province of Ontario either through F.K. Products, a sole proprietor, or at least he did so during 1976 and until November 18, 1977 when he assigned his rights in the product until August 1980 to Master Security Systems Limited, not made a party to the present proceedings although counsel for the Director sought unsuccessfully mid-way in the hearing to have such added as an applicant and thus subject to any order by the Tribunal.

In his reasons the Director alleged Applicants had brought themselves within the ambit of section 2 of the Act (which defines unfair practices) by making false, misleading or deceptive consumer representations namely that by using the Filter King motorists would achieve significant gasoline economies amounting to at least 10% fuel saving on North American manufactured automobiles. Such claims, it was alleged, were advanced in circulars

contained in the carton in which the Filter King was delivered to purchasers, on the container itself and in a handbill or single page brochure headed: "Toronto Star article November 11, 1976".

An investigator from the Director's department testified he had been told by a salesman when purchasing a Filter King that the device, in addition to being a good filter, was useful as a fuel pressure regulator and incidentally as a fuel saving device which, if it did not save 10% of fuel after proper installment in an automobile fuel system, could be returned within 30 days for a full refund of its cost - \$49.95 over the counter. The cash return policy was clearly stamped on the purchase invoice.

An independent consulting automotive engineer retained by the Director to test the device was called as an expert witness and reported the results of his tests of the device when installed on a standard North American automobile. In his opinion such automobiles are fitted by manufacturers with satisfactory fuel filters and fuel delivery systems so "add-on" devices such as Filter King could not be expected to improve efficiency under normal operating conditions. The results he reported of his tests were not accepted by the Tribunal because he had not strictly followed the manufacturer's or supplier's installation instructions, the test car was not operating at full efficiency at all times of testing and the driving conditions selected were not found to truly simulate normal city driving.

Another specialist, who had tested the Filter King at the Director's behest and who possessed qualifications as an expert, reported the device had produced no appreciable difference in fuel consumption on a car of North American manufacture.

Applicant called an engineer with qualifications in the automotive field as an expert who had at the material times worked with Applicants in marketing Filter King and had invested a considerable sum of money in obtaining a half interest in profits from extra-Provincial sales of the device in Canada. From his testing of the device on a Buick V-8 on city streets he found a 13% improvement in fuel consumption and smoother engine operation. His conclusion was that the addition of a Filter King was a worthwhile investment. The Tribunal however chose to disregard the findings of this witness due to his proprietary interest and similarly in the case of this witness' wife who had related to a newspaper reporter that her automobile had achieved a 26% improvement in tests which fact was prominently reported in an article in the Toronto Star and a reprint thereof was on occasion used by Applicants as promotional literature.

Applicants admitted having marketed about 1000 Filter King units before November, 1977 and this without any public promotion other than at a display booth at the Toronto Sportsman's Shows in 1977 and 1978 where interested persons were handed a specially prepared two-page brochure extolling the fuel saving virtues of the Filter King "as tested by the Toronto Motorist Nov. 11, 1976". Applicants, whose business name was imprinted thereon, admitted handing out about 500 of such brochures which bore slogans such as "10% saving in fuel usage", "better performance", "bench tested and proved world-wide" and similarly extravagant claims. Such claims, together with display signs reading "Save gas", "conserve energy", "Save Gasolene" at the display booth, were found by the Tribunal to be consumer representations within the meaning of its definition in the Act. Moller testified that the device did not produce 10% saving in small vehicles and Applicants stood ready to refund purchase monies when demanded, about eight purchasers having done so. A number of written reports of independent tests prepared in Europe and North America received in evidence were deemed by the Tribunal to be of no value as hearsay and uncorroborated.

The Tribunal found Applicants had made the aforesaid consumer representations which, if not ambiguous, were deceptive in that an important material fact was left unsaid namely, that fuel savings were not invariable e.g. in highway driving. In the result Applicants were ordered to cease and desist making representations respecting Filter King that it would invariably produce increased mileage per gallon of gasoline when installed.

REFERRED: As above.

1 9 7 8

TORONTO

Apr. 25, 2

LODIA LOMBARDO c.o.b. as BASSETTI & ZUCCHI
IMPORTING & DISTRIBUTING COMPANY and as
SILTAL IMPORTERS AND DISTRIBUTORS and
ANTONIO LOMBARDO

Applicants

and

DIRECTOR OF CONSUMER PROTECTION DIVISION OF THE MINISTRY
OF CONSUMER AND COMMERCIAL RELATIONS

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN MORNINGSTAR and
W. W. EVANS, C.A., MEMBERS

COUNSEL: N. W. TOMAS for Applicants
PETER J. WILEY for Respondent

MAY 16th, 1978

The Director made an order under section 6 of The Business Practices Act ("the Act") directing Applicants to cease and desist from certain business practices specified in his order which he deemed to be unfair practices by definition in section 2 of the Act namely, in making false, misleading and deceptive consumer representations in solicitation letters, that is to say, 1) in apparently offering a chance in a draw for prizes by merely returning a letter to Applicants' place of business, when such was not the case; 2) by indicating to prospective customers that they had been specially selected for special treatment in a given neighbourhood, when such was not the case; 3) by indicating to prospective customers that there would be bonuses given free to purchasers of merchandise of certain quantities, when such was not the case; 4) by indicating to prospective customers that Applicants were exclusive agents for certain cookware, when such was not the case; 5) by indicating Applicants would reward a customer by refunding the cost of merchandise bought elsewhere in Canada if the customers were successful in finding such merchandise elsewhere than at Applicants' place of business. The Director further alleged breaches of section 2 of the Act in representing goods offered for sale were of a better quality or grade than what they were and in offering specific price advantages through the granting of discounts which didn't exist and in promising guarantees with merchandise which weren't in fact given. Finally it was alleged that Applicants employed deliberate ambiguity in

written contracts of sale by changes in price, description of goods and who the true vendors were and by using terms of language patently not understood by the customers whose first, and in many cases only, language was Italian and lastly in using "high pressure" methods to induce customers to buy.

After hearing considerable evidence as to the foregoing the Tribunal was informed by the parties' counsel that Applicants were prepared to voluntarily comply with an order in terms that had been accepted by them and the Tribunal was asked to issue this order upon such consent in writing being filed with it.

ORDERED: Applicants, having agreed to comply with the provisions of The Business Practices Act regarding unfair practices, are ordered so to do.

1978

OTTAWA

ELICAN ALUMINUM MFG. LTD.

Apr. 17

Applicant
andREGISTRAR OF THE CONSUMER PROTECTION BUREAU
RespondentTRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS and ERNEST ASSALY,
MEMBERSCOUNSEL: STEPHEN APPOTIVE for Applicant
PETER J. WILEY for Respondent

APRIL 27th, 1978

In response to the Registrar's proposal to refuse registration to Applicant as an itinerant seller for purposes of The Consumer Protection Act ("the Act") Applicant required a hearing pursuant to section 7 of the Act. The Registrar's reasons for refusal were simply that Applicant at material times did not maintain a permanent place of business in Ontario as expressly required by paragraph 5a (4) of the Regulations made under the Act.

Applicant's first registration as an itinerant seller was in May, 1974 which expired at the end of the same year having failed to be renewed and it was only renewed in September 1977 which again was allowed to expire on December 31, 1977. In its application for renewal made in February 1978, Applicant gave a business address in Ottawa which, on investigation, proved to be non-existent or at the most a mail-drop, and a business telephone number which proved to be serviced by a telephone answering organization. On the basis of these facts the application was refused.

Evidence received by the Tribunal fully bore out the Registrar's allegations to the point of showing that the given Ottawa address was the office of a telephone answering bureau servicing no less than 139 customers for mail as well as phone calls. There was no doubt that Applicant received its mail and telephone messages promptly and there was no suggestion that Applicant failed in looking after inquiries and complaints received by this means. Applicant had no staff, records or other facilities at the Ottawa address or

in fact at any other place in Ontario and all of its business was handled from its office in Montreal, Quebec. Applicant's president testified that the 24-hour 7-days-a-week phone answering service provided better customer service and relations than a mere office with staff open in normal business hours. Applicant's sales in Eastern Ontario in 1977 amounted to \$441,000 which was equal to its Quebec business. A truck was kept in Ottawa to service its business area. It was strenuously argued on Applicant's behalf that the Ottawa facilities, such as they were, constituted a permanent place of business.

The Tribunal found to the contrary and that Applicant had not supplied in its application for registration an address for service in Ontario in accordance with paragraph 5a (3) of the Regulations to the Act, and further that the Registrar was therefore prevented from carrying out inspections of complaints as contemplated in section 22 of the Act and of inspections of premises and trust accounts under section 23 and of books of account, etc. under section 24 in order to determine whether there had been contraventions of the Act relative to Applicant's methods of carrying on business. In fact all such records of Applicant were apparently in Montreal.

The Tribunal's decision delivered orally was to uphold the Registrar's proposal for the reasons stated by him and found reasonable grounds for a belief that Applicant would not carry on business within the law and that, if permitted to be registered, Applicant would be carrying on activities that would be a contravention of the Act and Regulations thereunder.

ORDERED: As above.

1 9 7 8

PASQUALE MARSALA and CALOGERO LUCIA
carrying on business as
VILLA PAVING ASPHALT & CONCRETE CO.

TORONTO

Sept.15

Applicants
and

REGISTRAR OF CONSUMER PROTECTION BUREAU
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
BERT F. GRANT, Jr., MEMBERS

COUNSEL: PETER J. WILEY for Respondent
PASQUALE MARSALA in person

SEPTEMBER 15th, 1978

By notice dated June 29th, 1978 the Registrar proposed to revoke the Company's registration as itinerant seller of custom asphaltic and concrete pavement, its business for the most part being installing residential driveways. The Company as a partnership of Marsala, Lucia and a third person, was first registered in 1974 and in February 1978 as presently styled. Calogero Lucia died sometime in June 1978 and the Company thereupon became a sole proprietorship - that of Pasquale Marsala. In April 1978 the partners had consented to terms and conditions imposed by the Registrar when renewing the registration and the present proposal to revoke was accompanied with reasons alleging breaches of certain of such terms and conditions namely, the Company had failed in its undertaking to reply in writing within 10 days of receiving correspondence from the Registrar and Consumer Services Bureau to act upon requests for action on consumer complaints and to respond to consumer requests for adjustments on work ordered and supplied in accordance with the warranties furnished by contract. Instances of two such cases were cited namely Wolf and Borg. Marsala required a hearing in the name of the Company by way of appeal from the Registrar's proposal pursuant to section 7 of The Consumer Protection Act ("the Act"). In August the Registrant wrote Applicant citing two further cases of discontented consumers Pawley and Murray.

Evidence called by the Registrar supported the foregoing and included correspondence from the Bureau to the Company demanding action by the Company in dealing with the aforementioned complaints. Marsala testified he had satisfied a further complaint raised by the Bureau and produced a signed

statement from the consumer. No direct consumer evidence was produced, merely hearsay testimony of a Bureau staff members who admitted the Pawley complaint had been recently satisfied.

Marsala, testifying in his own behalf, indicated he had tried three times without success to meet with Professor Wolf and finally had patched the cracks produced by tree roots to Wolf's satisfaction. He had moreover completed the Borg job to the consumer's satisfaction. As for Pawley and Murray, neither had paid for the work done and owed Marsala \$550. and \$30. respectively. Marsala testified that the Company had already done several hundred driveways in 1978 and had only one complaint outstanding. Marsala in giving his testimony indicated he was not fluent, and could not write, in English and that since his partner's death he had been too busy supervising his men to attend to correspondence. Indeed to write letters he said he has to go to his bookkeeper's place of business for assistance.

The Tribunal found Applicant was in technical breach of section 22 (1) of the Act (failing to reply to correspondence from Respondent and Bureau), that the warranties supplied to tree customers had not been honoured. In all the circumstances the Tribunal was not prepared to revoke Applicant's registration which will be continued on the following conditions: that three outstanding jobs be completed to owners' satisfaction within 30 days; that all executory contracts hereafter contain a specification as to date of completion not beyond one month from the entry into such contract for paving or, if frustrated, such further date for completion as may be negotiated and reduced by writing by both parties; that consumers may cancel contracts not completed in the time so specified and receive back deposits; that each contract hereafter specify depth of asphalt as "compacted depth"; that Marsala is to reply to correspondence from the Registrar and Bureau within 10 days and promptly act thereon when action required; that all warranty work found to be necessary is to be performed within 60 days of it being requested; that Applicant company furnish forthwith a satisfactory surety of \$1,000 to the Registrar in favour of the Crown to be liable to forfeiture for failure to perform or observe the above conditions.

ORDERED: As above.

1978

MICHEL DUPUIS

Applicant

OTTAWA

Feb. 15

and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and BRIAN CONDIE
MEMBERS

COUNSEL: STEPHEN GRACE for Applicant
R.G. MACCORMAC, Registrar in person

MARCH 2nd, 1978

Applicant, a motor vehicle salesman registered under the provisions of The Motor Vehicle Dealers Act ("the Act"), required a hearing into the Registrar's proposal to revoke such registration for reasons fully supplied in his notice of proposal which, briefly stated, were: 1) Applicant had testified falsely in his sworn affidavit in support of his written application for registration by answering negatively to the statutory question as to previous convictions upon criminal offences; 2) that as regard his previous experience as a motor vehicle salesman he had testified falsely that he had been employed with a Montreal firm for 4½ years. The Registrar alleged that, in fact, Applicant had a record of the following convictions for offences under the Criminal Code, namely: in 1975, of indecent assault and theft over \$50.; in 1966, of theft from the person; in 1970, of carrying a concealed weapon and theft by conversion; in 1974, of four charges of fraud; and in 1976, of false pretences. Moreover, the Registrar alleged the period of employment in Montreal was of four months' and not 4½ years duration. Further, the proposal included an allegation that Applicant, when called to a meeting with representatives of the Registrar, had admitted the foregoing excusing his conduct on the basis that his would-be employer, a reputable Ottawa dealer, had advised him not to reveal his criminal record in the written application joined in by the dealer, an accusation that the Registrar believed to be false. Finally, it was alleged, Applicant had threatened the interviewers in the Registrar's office with physical violence on leaving the meeting.

Applicant's previous criminal record was proved in evidence before the Tribunal and that he had sworn falsely as to this in his application. The Acting Registrar, who had met with the applicant in the meeting above referred to, testified that it was not true that the revelation of a criminal record in an application was necessarily a bar to registration although penalties might be imposed for a period. As to the accusation of using physical threats to the person of the Acting Registrar, he testified that Applicant had raised his fist as if to strike him and at the same time uttered abusive language. The co-signer of the application was comptroller and an officer of the nominating dealer and he denied advising the Applicant to suppress his criminal record in order to ensure success with his application and this evidence was supported by the sales manager of the dealer.

Applicant, testifying in his own behalf, told of his employment in a "half-way house" for rehabilitating paroled and released convicts over a period of two years. He said he had worked as a case worker with children on an Indian reservation. He had been annoyed by the way he felt mistreated at the meeting with the Acting Registrar by the latter's making phone calls to his former employers behind his back and while he waited in an outside office and by the latter's refusal to shake his hand on greeting. He said he lost a job with the dealer the day following the phone call from the Acting Registrar. He refused to name the person who had advised him to make no mention of his criminal record in his application. The superintendent of the half-way house testified to Applicant's enterprise, leadership and sense of responsibility over a period of six years.

The Tribunal found the Registrar's allegations to be substantially made out and the Applicant had lied in his application to his employers and the Acting Registrar. In view of the need for honesty and integrity in salesmen dealing with the public the Tribunal could not find good reason to overlook Applicant's past misconduct and found that the Registrar was justified in concluding that, on his past record, Applicant could not be expected to carry on business in accordance with law and with integrity and honesty.

ORDERED: The Registrar shall carry out his proposal to revoke Applicant's registration as a salesmen of motor vehicles.

1 9 7 8

THUNDER B.

Nov. 2

LOH EXPEDITORS INC.
LLOYD O. HUNT & LOUIS J. BUSET
and

Applicants

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C., and
FRANK D. PROUSE, MEMBERS

COUNSEL: PETER G.F. YOUNG for Applicants
PETER J. WILEY for Respondent

NOVEMBER 30th, 1978

Applicants duly made application to the Registrar for registration, LOH Expeditors Inc. ("the Company") as motor vehicle dealer and Hunt and Buset each as a motor vehicle salesman. The Registrar refused all three by proposal in writing setting forth his reasons which may be summarized as follows: that the Applicants had since April, 1977 carried on activities that, if continued while they were registered, would contravene The Motor Vehicle Dealers Act ("the Act"). It was also suggested that the form of contract used by Applicants was unconscionable within the definition of such by section 2(b) of The Business Practices Act and hence an unfair business practice. Applicants thereupon required a hearing.

Evidence before the Tribunal showed the Company had placed display advertisements in a local paper in Thunder Bay advertising services as "pricing consultants" by which was meant that they offered to find articles such as automobiles and trucks, prefabs, farm and heavy machinery and mobile homes at lower prices than obtained locally. Hunt, founder of the Company and chiefly in charge, had concluded from his experience that opportunities were open to residents of Thunder Bay and district, (so far removed geographically and logically from Southern Ontario where the above articles were usually manufactured or at least offered for sale competitively) to obtain them more cheaply. Hunt conceived the idea that a responsible go-between, in truth a broker, could arrange through his connection for the purchase of such items at lower prices than those

prevailing in Thunder Bay, so much lower in fact, that, even when ship transportation of the items was included, there was still room for a broker's or finder's fee for his time and trouble. The Company required the intending purchaser to enter into a contract providing that the Company would use its best endeavours to locate the desired article at a price suitable to the purchaser and, whether or not a purchase and sale was accomplished, a minimum fee of \$150 would be payable to the Company in advance. The contract of purchase and sale would be made directly between buyer and seller.

A customer who had instructed the Company to find a truck with an uncommon combination of features testified that, although he had signed a purchase contract, he had refused to pay the Toronto dealer the balance due under the contract until the truck was ready for delivery to him and after an opportunity was afforded to him to inspect the truck in Thunder Bay. The purchaser "backed out" on the grounds that the Company could not guarantee that the colour and paint on the truck were as ordered and because it was more expensive than a unit he had subsequently found in a Thunder Bay dealership. The customer demanded return of his deposit of \$150. to the Toronto dealer and the \$150. fee paid in advance to the Company. Hunt testified he had returned to the purchaser \$290. of the \$300. deposited with him by the purchaser and that he may have been at fault in interpreting "red" as "metallic red".

Hunt, on Applicant's behalf, explained how he had gotten into the business in question saying he felt he was supplying a useful and productive service to the community. He had been informed by a representative of the Registrar that he need not be registered as dealer if he was not buying and selling cars. He had supervised the sale of some 40 automobiles from about 30 southern Ontario dealers between July and December, 1977 when warned by the local representative of the Registrar that he ought not to continue doing business until he obtained registration under the Act. It appeared that local automobile dealers had, for a time, refused to perform warranty adjustments for owners of vehicles purchased through the Company thus embarrassing Hunt with his customers but the manufacturers subsequently changed this policy to permit his dealer to present warranty claims.

The Tribunal's findings were that Applicants had held themselves out as motor vehicle dealers while not registered as such and thus had contravened the Act.

ORDERED: The Registrar shall carry out his proposal to refuse the registrations sought.

1978

TORONTO

July 27

FRITZ K. LOITSCH operating as
PENN AUTO SALES and
FRITZ K. LOITSCH
Applicants
and

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL : J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C., and
HERBERT KEARNEY, MEMBERS

COUNSEL: R.H. BARCH for Applicant
RESPONDENT, R.G. McCORMAC in person

AUGUST 10th, 1978

Applicant Loitsch was refused renewal of registration as motor vehicle dealer and salesman by notice from the Registrar with reasons which amounted to allegations of operating the dealership while unregistered.

At the outset of the hearing counsel for all parties indicated their wish to proceed by way of section 4 of The Statutory Powers Procedure Act and applied to the Tribunal to make its order approving the agreement between the parties. The Tribunal acceding to such request ordered that Applicants be granted the registrations sought subject to conditions to continue to December 31st, 1978 as follows - that such registrations continue during good behaviour and to be liable to suspension or recall for any contravention of The Motor Vehicle Dealers Act and regulations thereunder and of any other statute relevant to their fitness to be registered; and that such registrations be continued only so long as registrants provide the Registrar with all information deemed by him necessary and so long as no automobiles are received on consignment and any such which are offered for sale shall have been paid for and title first transferred to the dealership; and that all records required to be kept by The Motor Vehicle Dealers Act, The Consumer Protection Act and the Highway Traffic Act be maintained; and that reasonable inspection by the Registrar be permitted; and that the dealership forthwith provide the Registrar with two \$1,000 bond term deposit

receipts payable to the Crown, one maturing December 31, 1978 and one on December 31, 1979 to be subject to forfeiture on breach of any of the foregoing conditions.

ORDERED: As above.

R 183

197

PETER W. WEBSTER

Applicant

and

TORONTO
Apr. 11REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
RespondentTRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and J. TIM HOGAN
MEMBERSCOUNSEL: JOEL B. KOHM for Applicant
A.N. MAJAINA for Respondent

MAY 3rd, 1978

The Registrar proposed suspension for two months of Applicant Webster's registration as a salesman under The Motor Vehicle Dealers Act ("the Act") for reasons set forth in the notice of his proposal made after Webster and a co-salesman at the same dealership were first afforded an opportunity to explain a transaction of purchase of a used car by Webster and its resale to a customer of the dealership during the absence of its chief executive. The transaction complained of and not satisfactorily explained by Webster and his accomplice involved the private purchase by Webster for \$2,500. of a 1974 Volvo through the wife of its owner who was seriously ill and its immediate re-sale to a customer of the dealership for \$4,000. It was alleged, in the first place, that Webster lacked any authority to carry out a private purchase from persons who approached the dealership wishing to sell, and secondly, that having done so he ought not to have pocketed the profit. It was further alleged that, Webster not having transferred the vehicle to his own name through registration as required by law, proceeded to arrange for the transfer of registration from the former owner directly to the ultimate purchaser and, in the process, disclosed by means of a forged signature, a false sales value thus defrauding the Province of Ontario of \$196. of sales tax. When the retail sales tax inspectors became suspicious and raised questions, Webster paid in the deficiency of tax apparently with interest to cover up but not without the Registrar having become aware of the matter through complaints from the chief executive of the dealership and the ultimate purchaser.

Evidence presented to the Tribunal supported the foregoing allegations and also indicated Webster's former good conduct and reputation extending from his first registration as salesman in 1967. The Tribunal found the ultimate purchaser was partly if not entirely aware of the scheme, only making complaint after Webster refused to split the mark-up in price between him and the former owner. Webster's testimony, by way of explanation, was not accepted by the Tribunal and concluded that his conduct afforded reasonable grounds to the Registrar for a belief that he would not carry on business in accordance with law and with integrity and honesty. However in view of his previous good record Applicant should be suspended for one month instead of two, as proposed, as a deterrent to others.

ORDERED: The suspension proposed is reduced to one month.

1978

TORONTO

Jan. 23

338570 ONTARIO LIMITED

Applicant

and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C. CHAIRMAN
W. W. EVANS and JOHN HURLBURT,
MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

JANUARY 23rd, 1978

Applicant had been refused registration as a builder for purposes of The Ontario New Home Warranties Plan Act, 1976 ("the Act") by the Registrar who further proposed to suspend Applicant's provisional status of registration, from which Applicant appealed requiring a hearing. The reasons given by the Registrar in his proposal were, briefly, that Applicant lacked such financial responsibility as the Registrar is entitled to find for the purposes of section 7 (1) (c) of the Act. Evidence before the Tribunal supported the Registrar's position.

The Tribunal gave its decision orally and without reasons, viz that the Registrar should carry out his proposal to refuse registration and to revoke the provisional registration of the Applicant.

ORDERED: As above.

1 9 7 8

TORONTO

Mar. 6

BRIERWOOD CONSTRUCTION LIMITED

Applicant
andREGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT
RespondentTRIBUNAL: H.F.H. SEDGWICK, VICE CHAIRMAN as CHAIRMAN
C.C. HILLMER and LOU RICE,
MEMBERSCOUNSEL: ANTHONY ROCCO Agent for Applicant
BRIAN M. CAMPBELL for Respondent

MARCH 6th, 1978

Applicant required a hearing into the Registrar's refusal to register Applicant for purposes of The Ontario New Home Warranties Plan Act ("the Act") for reasons stated.

Following evidence received the parties indicated neither required reasons for its decision from the Tribunal and accordingly none were given.

The Tribunal gave its oral decision as follows:

Registrar is to carry out his proposal to revoke Applicant's temporary registration and to refuse Applicant registration unless Applicant furnishes to the Registrar not later than one month hereafter a statement of its financial affairs as at December 31, 1977 together with such other information as to its financial worth as the Registrar may reasonably require together with a statement of the personal net worth of its principal, Mr. Anthony Rocco, in support of his guarantee in favour of, and for the purposes of, the Plan.

ORDERED: As above.

1978

CAMPBELL CONSTRUCTION

TORONTO

Applicant

June 19

and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT
RespondentTRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C., and
JOHN C. HURLBURT, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

JUNE 19th, 1978

Applicant required a hearing to obtain a review of the proposal of the Registrar to revoke its status of temporary registration and to refuse to register Applicant for purposes of The Ontario New Home Warranties Plan Act, 1976 ("the Act"). In his proposal the Registrar relied on section 7 (1) of the Act finding that, having regard to its financial position, Applicant could not reasonably be expected to be financially responsible in the conduct of its undertaking and, as evidence therefor, that Applicant had failed to respond to written requests for information and to pay the enrollment fee for a house under construction.

Applicant was not represented at the hearing as no one appeared on its behalf although the hearing was delayed to permit late attendance. Due service upon Applicant of notice of the hearing was shown to have been made which included a warning that, in the event of the non-attendance of a representative of the Applicant, the Tribunal would proceed with the hearing without further notice to Applicant.

Evidence produced by Respondent indicated Applicant was a declared bankrupt with an apparent deficit of \$70,646.

Tribunal found Applicant was not financially responsible and having regard to its financial position the Registrar was correct in his reasonable expectation that it could not continue responsibly in its undertaking.

ORDERED: The Registrar shall refuse registration to Applicant and revoke its temporary status of registration.

TORONTO

Dec. 15

D'ALBERTO CONSTRUCTION LIMITED

and

Applicant

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

RIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
LOU RICE, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent
SECONDO D'ALBERTO representing Applicant

JANUARY 16th, 1979

Applicant was refused registration under The Ontario New Home Warranties Plan Act, 1976 ("the Act") by proposal of the Registrar thereunder ("the Registrar") for reasons set forth in the proposal and which Registrar considered to constitute grounds provided in section 7 (1) subsection (c) that, having regard to the Corporation's financial position, it could not reasonably be expected to be financially responsible in the conduct of its business and that, having regard to the past conduct of its officers or directors, he (the Registrar) was afforded reasonable grounds or belief that its undertakings will not be carried on in accordance with law and with integrity and honesty. Examples of the Corporation's conduct alleged included its failure to correct deficiencies in five enrolled house units which eventually resulted in claims upon the guarantee fund under the Plan brought into being by the Act. It was further alleged that Applicant had continued to act as a builder of homes while unregistered as such and has neglected to supply certificates of completion and possession of some 16 homes it had sold.

Evidence produced by the Registrar indicated Applicant had first been refused registration in April 1978 on the ground of financial irresponsibility citing its failure to demonstrate it had sufficient financial capability to complete its indicated building program and its failure to respond to repeated written requests and demands for financial information. In June, 1978 Applicant's accountant produced an unaudited balance sheet and profit and loss statement as at December 31, 1977 which indicated a substantial deficit and loss for the year then ending. Evidence was presented of a number of dissatisfied purchasers of homes with deficiencies requiring correction and resulting in claims on the guarantee fund under the Plan.

It was apparent the Applicant corporation had taken no steps to correct such deficiencies or even to respond to demands made upon it for same. Applicant had produced and sold some 17 homes which had been enrolled under the Plan. Secondo D'Alberto, president and only director of the Applicant corporation, testified as to his endeavours to personally finish the homes constructed and his evidence was in conflict with that given by the Hamilton Regional Manager of HUDAC concerning outstanding complaints of homeowners. D'Alberto was able to produce a number of certificates of completion and possession from owners so, in the end, the Tribunal found that only seven certificates were unaccounted for and of these D'Alberto said he still expected to receive two from the owners.

The Tribunal found Applicant had not been financially responsible in the conduct of its business and had neglected to perform some warranty obligations and to reply to inquiries and demands from the Registrar, and had failed to send in certificates of completion and possession as received. It further found Applicant had acted as a builder while unregistered under the Act.

ORDERED: The Registrar shall carry out his proposal to refuse registration.

1978

TORONTO

Oct. 10

BRUCE DELAURIER CONSTRUCTION

and

Applicant

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A., and
JOHN HURLBURT, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

OCTOBER 10th, 1978

Applicant required a hearing on being informed by notice from the Registrar that he proposed to refuse to register the Applicant and revoke its temporary registered status because, in the Registrar's opinion, Applicant's financial position was not one giving rise to the expectation that Applicant would be financially responsible in conducting its undertaking. Registrar recited numerous failures by Applicant in responding to repeated requests for financial information.

No one appeared at the hearing for the Applicant although due notice was proved including a warning that, in the event of the non-appearance of the Applicant, the Tribunal may proceed to hold a hearing without further notice to Applicant.

Evidence led by the Registrar indicated his allegations above were justified and that such financial information as has been supplied was totally deficient. The Tribunal directed the Registrar to carry out his proposal.

ORDERED: Applicant's temporary registration is revoked and registration refused.

1 9 7 8

TORONTO

Apr. 24, 1978

FALCONHURST CONSTRUCTION (OAKVILLE) LIMITED

Applicant

and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN MORNINGSTAR and
STEPHEN PUSTIL, MEMBERS

COUNSEL: WILLIAM J. CORNWALL for Applicant
BRIAN M. CAMPBELL for Respondent

MAY 16th, 1978

Applicant required a hearing under section 9 of The Ontario New Home Warranties Plan Act, 1976 ("the Act") into Respondent's proposal to refuse to grant it registration and revoking its temporary registration. In doing so Respondent relied on section 7(1) (c) and alleged that Applicant was not entitled to registration because, having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertaking. Respondent expressly referred to the Company's admitted deficit at December 31, 1975 of \$745,502 including the year's loss of \$30,523. and its failure to supply personal guarantees from the principal shareholders of the Company supported by statements of their personal net worth as required by the Respondent preliminary to a consideration of the Company's application for registration under the Plan of the Company's inventory of 213 condominiums.

Evidence presented by the Respondent Registrar supported the above allegations and disclosed the Company had declined to produce the desired guarantees and statements submitting instead a bank letter in support of its application that merely described the Company as an accomplished and very capable builder, responsible in its undertakings and who met its obligations promptly. Correspondence from the Company to the

Registrar was entered in evidence including its financial statement at December 31, 1976 indicating in its balance sheet a strong cash position, i.e. \$1,565,000. in deposit receipts, fixed assets less depreciation at more than \$2,000,000. as against current liabilities of almost \$7,000,000. and long-term liabilities of approximately \$3,800,000. These figures reflect a deficit standing at \$650,779. Finally, the Company had submitted a draft statement of the Company's financial condition as at December 31, 1977 indicating current assets of \$344,000. developed land at \$615,000. and investments (chiefly mortgages receivable) of \$952,000. and fixed assets less depreciation at about \$2,000,000. The draft report included a statement of accumulated deficit of \$425,633.

Mr. Borland, Hudac Registrar, said the Corporation's registration committee was not prepared to rely on market values of fixed assets as these could have a declining value in a falling market and were unreliable in determining the value of the owner's equity. The mortgage investment manager of a life insurance company which held mortgages against the Company's land and buildings of \$2,750,000. testified that the mortgages were in good standing, that the buildings were well maintained and fully worth \$5,400,000 to \$5,800,000. at current values. He admitted that his company accepted market values in appraising real estate loans and ignored book values which reflect cost less depreciation. An officer of the Applicant, a chartered accountant of 25 years experience, testified that he had produced the Company's financial reports submitted to the Registrar and that such were accurate but not a proper guide in estimating the shareholders' equity. He expressed the opinion that the replacement value of the Company's land and buildings was \$5,860,000 as compared with the most recent balance sheet value arrived at by using cost less depreciation viz \$2,660,000. He said 141 condominiums had been sold in 1977 and only six were left unsold at an average cost of \$40,000. and having an average sale value of \$42,500. He said the principals of the Company considered it unreasonable to provide personal guarantees and statements of net worth in support of the Company's application for registration and condominium enrollment.

The Tribunal disagreed with the arguments advanced on Applicant's behalf that a deficit position in the surplus account is not a true indication of the Company's net worth because the market value of its inventory of condominiums and land far exceeds the cost less depreciation as reflected in its financial reports. Nor did the Tribunal accept the argument that the Company's apparent ability to meet its obligations on a current basis should be decisive in determining the question of its ability in the future to meet unforeseen obligations particularly in a down-turn of the market.

The Tribunal, for these reasons, ordered that the Registrar's proposal be sustained but directed that the Applicant Company be registered upon its furnishing a bond in aggregate amount representing \$3,000. per unit for each of the 44 condominium units for which closing transactions had not been completed.

ORDERED accordingly.

1 9 7 8

TORONTO

Apr. 13

FINCUP HOLDINGS LIMITED

Applicant
and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL : J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C. and
JOHN C. HURLBURT, MEMBERSCOUNSEL: GLYN R. STANGER Q.C. for Applicant
BRIAN M. CAMPBELL for Respondent

APRIL 18th, 1978

Applicant required a hearing following receipt of Respondent Registrar's proposal to revoke its temporary registration and to refuse to grant it registration under The Ontario New Home Warranties Plan Act, 1976 ("the Act") as a builder of homes. The reason given in his proposal was that, having regard to its financial position, Applicant could not reasonably be expected to be financially responsible in the conduct of its undertakings as required by section 7 (1) (c) (i) because, it was alleged, although the Company admitted deficits of \$213,356 and \$328,794 as reflected in financial statements for fiscal years ending December 31, 1975 and 1976 respectively, the principals steadfastly refused to furnish personal guarantees in favour of HUDAC supported by statement of net worth.

The Registrar testified to the foregoing allegations and that Applicant had built 87 condominiums in Hamilton which remained unsold. He gave it as his opinion that a builder must be registered in order to sell condominium units. He admitted, under cross-examination, that, although the Act does not specify that personal guarantees are to be given by builders, the Hudac committee dealing with registrations, as an accommodation, offered this as an alternative to providing guarantee bonds.

Applicant's president testified he had had 20 years of experience in house building and in construction of large buildings. He said 16 of the 87 condominiums had been sold.

He said that a bank financing loan had been arranged to cover completion of the 87 units and that he and his partner had had to personally guarantee such loan and that the Company is endeavouring to liquidate its assets for \$11,500,000. and had signed a letter of intent to such effect. He said the Company's bankers has suggested that he and his partner not provide the guarantees requested by the Registrar. He added that the Company's affairs were under control of a management consultant operating on the bank's instructions and such manager testified verifying the president's evidence adding that, in his opinion, the Company's present problems were in a cash flow deficiency. He went on to say that if the Company were to sell its assets en bloc a loss of one million dollars would result. He ventured to say that so long as the bank waived interest for its blanket debenture over the property, the Company could continue. On cross-examination he admitted the Company had a negative net worth. Finally he said the principals were probably judgment-proof and that although the Company was not in a position to undertake the cost of any substantial amount of warranty work in the foreseeable future, it was nonetheless a viable operation.

The Tribunal found that the Registrar had reason to doubt that the Company could be reasonably expected to be financially responsible in its undertaking and that the conduct of the Company's principals and officers afforded reasonable grounds for the belief that the Company's undertaking would not be carried out in accordance with law. Accordingly, the Registrar was directed to carry out his proposals.

ORDERED : As above.

Y 66

1978

TORONTO

June 19

HIGLENE BUILDING CORPORATION
LIMITED

and **Applicant**

and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C., and
JOHN C. HURLBURT, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

JUNE 19th, 1978

A hearing was required by Applicant under section 9 of The Ontario New Home Warranties Plan Act, 1976 ("the Act") in response to the Registrar's proposal to revoke its status of temporary registration and to refuse substantive registration for the purposes of the Act for reasons, shortly stated, that a recent unaudited financial report on Applicant's affairs indicated a deficit in shareholders' equity of \$238,592. and indications of failing credit and the failure of Applicant to obtain further capital by way of equity investment to produce a surplus or reserve of at least \$150,000. as required by the Registrar together with a surety bond as prescribed conditions for registration provided in paragraph 11 of the Regulations under the Act.

Evidence before the Tribunal indicated Applicant was in process of building 48 condominium units which were substantially complete although further financing of about \$250,000. would be needed beyond the \$2,200,000. already assured. It was hoped to obtain the needed further sum by increase of the first mortgage or a second mortgage. A principal of the Applicant testified that it was both difficult and expensive to obtain a surety bond in the amount of \$388,000. requested and that both partners in the business were loath to furnish personal guarantees of such amount supported by personal net worth statements. He indicated both principals had already borrowed by second mortgages on their homes in support of their investment in Applicant and couldn't go further.

The condominium building already had more than \$175,000 of mechanics' liens registered against it and Applicant's bank had so far refrained from exercising its power of sale over certain of Applicant's realty.

Tribunal found the Registrar was justified in refusing to register Applicant having regard to its financial position and that it could not be considered as financially responsible in the conduct of its undertaking.

ORDERED: Registrar shall refuse registration.

1 9 7 8

TORONTO

Dec. 11

KARATSOREOS CONSTRUCTION

Applicant
andREGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT
RespondentTRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
LOUIS RICE, MEMBERSCOUNSEL: BRIAN CAMPBELL for Respondent
CHRIS KARATSOREOS Agent for Applicant

JANUARY 4th, 1979

A hearing was required by Applicant, an unincorporated construction firm owned and operated by three Karatsoreos brothers which had been granted temporary registrations under the above Act in 1976, subsequently revoked by proposal of the Registrar in April 1977 on grounds of a lack of the financial information required. Upon a fresh application for registration being received from Applicant in July, 1978, the Registrar thereupon refused to grant registration basing his decision upon a record of breaches of warranties and failure to complete performance of building contracts as provided in section 8(2) of the Act. Added to such grounds were complaints of a failure to indemnify the HUDAC Corporation as insurer from possible losses to the guarantee fund under the Plan due to Applicant's failure to diligently perform its several construction undertakings. There was moreover complaint that Applicant repeatedly failed to respond to requests for particulars regarding complaints from homeowners against it and received by HUDAC.

There was evidence of Applicant's want of workmanship, breaches of the Ontario Building Code and, even after conciliation proceedings between a house purchaser and Applicant under section 17 of the Act, Applicant failed to make good many defects found to be its responsibility in the conciliation report. In fact it had been necessary to retain another housebuilder to perform or correct some 49 defects. Two other purchasers had not been satisfied with Applicant's work on their houses and demands to correct these were apparently ignored.

Evidence presented by Chris Karatsoreos did not convince the Tribunal sufficiently to excuse the gross breaches of the Act and the catalogue of builder's mistakes and bad workmanship not to mention delays or outright failures in performing required warranty work. The allegations of the Registrar recited above were found to be proved.

ORDERED: Applicant is refused registration and Registrar's decision to refuse to renew is upheld.

1978

TORONTO

KEN-WARD HOMES LIMITED

Mar. 6

and

Applicant

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: H.F.H. SEDGWICK, VICE CHAIRMAN as CHAIRMAN
CAMERON C. HILLMER and LOU RICE,
MEMBERS

COUNSEL: IAN S. McLENNAN for Applicant
BRIAN M. CAMPBELL for Respondent

MARCH 6th, 1978

Applicant required a hearing under section 9 of The Ontario New Home Warranties Plan Act ("the Act") in response to the Registrar's proposal to revoke its temporary registration status and to refuse it status as a registered builder for purposes of the Act. The Registrar's reasons were that, having regard to the Applicant's financial position, it could not reasonably be expected to be financially responsible in the conduct of its undertakings as provided in section 7 (1) (c) (i) of the Act in that it had failed to produce a financial statement when required to do so (paragraph 9 (3) 3 of the Regulations).

Counsel for the parties requested an oral decision without reasons.

Evidence before it satisfied the Tribunal that the Registrar had sufficient grounds for his proposal.

ORDERED: The Registrar shall carry out his proposal.

1 9 7 8

TORONTO

Jan. 23

SHUTT CONTRACTORS LIMITED

Applicant
and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, C.A. and
JOHN HURLBURT, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

JANUARY 23rd, 1978

Applicant, on being refused registration as a builder for purposes of The Ontario New Home Warranties Plan Act ("the Act"), and threatened with revocation of its status of provisional registration, required a hearing under section 9 of the Act. The reasons given by the Registrar for such refusal and revocation were, briefly stated, that Applicant lacked such financial responsibility as the Registrar may reasonably require to find under section 7 (1) (c) of the Act. The evidence received at the hearing did not controvert the allegation of the Registrar or the evidence upon which he had relied.

In its oral decision the Tribunal upheld the Registrar's proposal to revoke the provisional registration of the Applicant and to refuse its registration under the Act.

ORDERED: As above.

1 9 7 8

TORONTO

Sept. 11

MR. & MRS. FREDERICK G. THOMPSON

Applicants
and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
CAMERON C. HILLMER and
STEPHEN PUSTIL, C.A., MEMBERSCOUNSEL: PETER J. RADLEY for Applicants
BRIAN M. CAMPBELL for Respondent

SEPTEMBER 25th, 1978

Applicants, as owners of a home as defined in The Ontario New Home Warranties Plan Act, 1976 ("the Act") were claimants under the Plan upon the guarantee fund in respect of the warranties provided in the Act. Following completion of their purchase of a new house in Kingston purchasers had assumed possession on June 1st, 1977. At the time of closing purchasers received the usual certificate from the builder to the effect that their new home was substantially complete and that the warranties under the Plan would accrue from date of possession but such certificate listed seventeen items needing correcting or completing and bore purchasers notation that they had been forced to advance \$3,857. extra to the agreed purchase price to lift a mortgage against the property and that there remained a mechanics' lien against the house amounting to \$1,093. The house builder, having on September 27, 1977 made an assignment in bankruptcy, was unable to complete the items remaining to be completed at the time of the closing of the purchase, including the supply of materials for and erection of an 18 x 26 foot garage including poured concrete floor and 16 x 7 foot door.

Claimants having filed proof of their various claims in December, 1977 with the Corporation administering the Act the Corporation recognized and in February, 1978 authorized work to correct deficiencies in the house at the expense of the guarantee fund in the amount of \$858. and \$67. The Corporation however refused liability of the fund in respect of claimants' demand for \$3,726. referred to above on the basis that such advance was voluntarily made in order to complete the purchase and was done on claimants' own advice and risk. Regarding the

mechanics' lien claim of \$1,093. against the house the Corporation held this not to be in the character of deficiencies covered by the Hudac warranty program. Claimants thereupon applied to the Tribunal under section 16 of the Act by way of appeal from such award decision.

The Tribunal sustained the Corporation's award except in regard to its denial of Applicants' claim for \$1,093. for the cost of completing the garage which was the builders' responsibility and gave rise to the mechanics' lien claim. Applicants' claim for \$150. covering court costs in connection with the mechanics' lien is not in the category of allowable claims under the Act and is disallowed.

ORDERED: As above.

1 9 7 8

TIMCOR LEASEHOLDS LIMITED

and

Applicant

TORONTO

Sept.11

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT
RespondentTIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and STEPHEN PUSTIL, C.A.
MEMBERSCUNSEL: BRIAN M. CAMPBELL for Respondent
PETER F. THALHEIMER agent for Applicant

SEPTEMBER 11th, 1978

By notice to the Applicant Company ("Timcor") the Registrar proposed to refuse to grant it registration under the Ontario New Home Warranties Plan Act, 1976 ("the Act") and to revoke its temporary registration for reasons he gave in such notice which, in summary, were that Timcor's financial position as revealed in the uncertified financial statement of its affairs as at December 1976 indicated it could not reasonably be expected to be financially responsible in the conduct of its undertakings as required by section 7 of the Act. In his reasons the Registrar referred to the indicated earned surplus balance as stated at the end of 1975 and 1976 of \$98.00 under the statement of shareholders' equity on the balance sheet. Elsewhere in the balance sheet were indicated "notes payable to shareholders - \$1,111,912." with regard to which the Registrar demanded Timcor furnish him with its undertaking to leave with the Company a minimum of \$100,000 of such loans by shareholders for a one year period. The Registrar further alleged breaches of section 9 (2) or of By-law R-2 paragraph 6 of the Regulations under the Act in failing or neglecting to respond to the Registrar's repeated requests for further financial information. Timcor required hearing pursuant to section 9 of the Act and was represented at the hearing by its President and principal shareholder, Mr. Thalheimer.

Evidence presented on the Registrar's behalf included further disclosures as to Timcor's financial position by a note of its balance sheet at December 31, 1976 that a mechanics' lien action lay against it for \$4,420. and confirmed the above allegations regarding loans by shareholders represented by notes due in sum of \$1,111,912. Timcor's bankers had represented to the Registrar that Timcor enjoyed their confidence and substantial lines of credit. The Registrar had requested personal guarantees

of the principal shareholders supported by certified statements of their personal net worth which demand Timcor vigorously refused. An alternative to such guarantees so supported was offered in the form of the undertaking to maintain \$100,000 of amounts due to shareholders referred to above. The Registrar admitted Timcor had 44 housing units under construction of which some were already sold. As to complaints of purchasers regarding homes these had largely been rectified. The Registrar asserted his offer of partial postponement of payment of shareholders' loans was reasonable and easier to supply than a surety bond which he could have demanded.

For the Applicant, evidence indicated Timcor had completed 125 homes in 1977. As at December 31, 1977 Timcor had had 25 units unsold and of these only 6 presently remain unsold. Timcor's shareholders had refrained from taking returns of money and had made further advances of \$200,000 to Timcor in June 1977. All shareholders' loans were postponed to its bank indebtedness. On Timcor's behalf it was claimed the assets were shown at cost in its balance sheet of December 31, 1976 (the last available) whereas the market values of certain assets were in fact much higher.

The Tribunal found the Registrar was justified in his assessment of Timcor's financial responsibility but, in view of Mr. Thheimer's apparent willingness to reconsider the Registrar's proposal to defer repayment of \$100,000 of shareholders' loans for one year, the Applicant was allowed to remain registered for a further two weeks to permit compliance following which registration would be continued.

ORDERED : As above.

1 9 7 8

TORONTO

June 19

TREVOR EVANS DEVELOPMENTS LIMITED

Applicant
andREGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT
RespondentTRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C., and
JOHN C. HURLBURT, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

JUNE 19th, 1978

Applicant required a hearing under section 9 of The Ontario New Home Warranties Plan Act ("the Act") for review of the proposal of the Registrar to revoke its temporary registration and to refuse its registration for purposes of the Act. The Registrar had found Applicant's financial position such that it could not be expected to be financially responsible in the conduct of its undertakings because of the failure of the principal of the company to provide HUDAC Corporation with his personal guarantee supported by proof of his personal net worth when requested repeatedly by the Registrar to do so in substitution of the usual bond to be deposited with applications for registration under paragraph 11 of the Regulations under the Act. The Registrar was concerned that the sparse information as to the Company's financial position supplied in support of its application for registration indicated a deficiency of equity and a low cash position. Finally the Registrar alleged the Company had failed to enroll its new construction and inventory of unsold houses.

Evidence received by the Tribunal verified the foregoing and that the Registrar was prepared to register the Company on receipt of the personal guarantee which the principal had, at first, promised to provide but finally refused.

Tribunal found, on the evidence, that Applicant could not be considered to be financially responsible in view of its financial condition but directed the Registrar to register Applicant if, within 7 days following the date of the hearing, the principal provided the Registrar with his personal guarantee; otherwise, Registrar to carry out his proposal to revoke Applicant's temporary registration and refuse it registration.

ORDERED: As above.

Y 55

1 9 7 8

TORONTO

Feb. 23

UNIVERSAL CONSTRUCTION

and

Applicant

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT
RespondentTRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and
LOU RICE, MEMBERSCOUNSEL: BRIAN M. CAMPBELL for Respondent
APPLICANT by VENNIO VALENTINI, Agent

FEBRUARY 23rd, 1978

Applicant was refused a grant of registration as a builder for purpose of The Ontario New Home Warranties Plan Act ("the Act") and in the same proposal the Registrar sought to revoke its temporary/probationary registration under section 8 of the Act for reasons that may be summarized as a lack of financial responsibility in that Applicant had failed to provide financial statements of its affairs as required by paragraph 9 (3) 3 of the Regulations to the Act.

The decision of the Tribunal was orally given without reasons as follows: The Registrar shall carry out his proposal to revoke Applicant's provisional registration and to refuse it registration under the Act provided that, if Applicant shall, not later than March 9, 1978 provide the Registrar with a certified statement as to its current financial affairs together with the personal guarantee of Vennio Valentini in lieu of a performance guarantee as defined in paragraph 1 (p) of Part I of the said Regulations and statement of current net worth of Vennio Valentini in support of such personal guarantee.

ORDERED: As above.

TORONTO

Nov. 16

ANTONIUS VANDER LINDEN

Applicant
and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN MORNINGSTAR and
STEPHEN PUSTIL, C.A.
MEMBERS.

COUNSEL: BRIAN M. CAMPBELL for Respondent

NOVEMBER 16th, 1978

Applicant required a hearing into the proposed order of the Registrar to revoke his registration as a builder under The Ontario New Home Warranties Plan Act, 1976 ("the Act") pursuant to section 9 thereof. The Registrar based his action on section 7 (1)(a) of the Act which provides that an applicant is entitled to registration except where:

"(a) having regard to his financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of his undertakings"

The Registrar referred to the bankrupt condition of the Applicant.

The Applicant did not appear and was not represented although due service upon him of the Tribunals notice of hearing was found to have been given. The opening was delayed one half hour awaiting his appearance.

The Tribunal was presented with evidence of Applicant's bankruptcy and that a receiving order had been made in August, 1978.

ORDERED: The Registrar shall carry out his proposal.

1978

TORONTO

Dec. 11

VANDERSCHAAF CONSTRUCTION LIMITED

Applicant
and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN MORNINGSTAR and
LOU RICE, MEMBERSCOUNSEL: BRIAN M. CAMPBELL for Respondent
HERMAN VANDERSCHAAF agent for Applicant

JANUARY 10th, 1979

The Registrar having by his proposal under section 9 of The Ontario New Home Warranties Plan Act, 1976 ("the Act") refused to register Applicant as a builder under the Act, Applicant required a hearing therein. The reasons furnished by the Registrar were Applicant's record of alleged breaches in respect of warranties and of failure to complete performance of house contracts which are sufficient grounds for such refusal under section (2). The Registrar further alleged that Applicant had failed to indemnify the HUDAC Corporation as required by agreement between them for losses or potential losses to the guarantee und under the Plan arising from Applicant's failure to perform its obligations under the Plan. The Registrar also alleged pplicant failed to respond to demands for action in completing ouses and in rectifying deficiencies in construction.

The Tribunal heard a review of the record of transactions between Applicant and the Registrar who is charged with responsibility under the Act to grant registration to applicants therefor except those who, in his judgment, lack financial responsibility or whose past conduct affords him with reasonable grounds for a belief that they will not perform their undertakings in accordance with law and with integrity and honesty. Such review indicated Applicant company had submitted a financial statement of its affairs indicating a weak cash position and Registrar thereupon requested personal guarantees from the Company's principal shareholder which was supplied and registration was thereupon granted in June, 1977. A year later on applying for annual renewal of registration and filing therewith a statement of its financial affairs as at November 30, 1977 it appeared the Company had an even weaker balance sheet and increased losses compared to a year earlier. The Registrar thereupon requested a notarized statement of the principal's then net worth. Before this

additional requirement was forthcoming Applicant was placed in receivership by the Company's debenture holding creditor, a lumber supplier, and the receiver decided not to continue operations of the Company once made aware of the numerous claims of home owners for uncompleted work. Applicant's answer to the allegation of failing to complete homes and remedy deficiencies was supplied by Applicant's principal who testified that the receiver's intervention had frustrated all efforts in these directions and that he was personally unable to redeem any equity he had in the Company since his personal debts amounted to between \$600,000 and \$700,000 and that, by his estimates, the Company's deficit could be as much as \$200,000. if it did complete necessary work and rectify deficiencies in the houses it had undertaken to build.

The Tribunal found Applicant lacked financial responsibility had failed to perform its obligations which it had agreed to perform under the Plan and had fallen down in the matter of performance of warranty work in completing homes and in correcting deficiencies and in fulfilling building contracts, all as alleged by Registrar. Accordingly the Tribunal would uphold the Registrar's refusal to register Applicant on ground of lack of financial responsibility and past conduct.

ORDERED: Applicant shall not be registered under the Act.

TORONTO

Dec. 11

RALPH VECCHIO

Applicant

and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
LOU RICE, MEMBERS

COUNSEL: WILLIAM J. BUCHNER for Applicant
BRIAN M. CAMPBELL for Respondent

JANUARY 4th, 1979

Applicant ("Vecchio") required a hearing by way of appeal from the Registrar's proposed decision to refuse renewal of his registration as a builder under The Ontario New Home Warranties Plan Act, 1976 ("the Act") and to revoke his temporary status as such. The Registrar cited as his reasons that Vecchio had a record of breaches of warranties, one of the grounds in section 8(2) of the Act for refusal. Another reason was Applicant's alleged failure to complete performance of obligations undertaken by all builders by agreement with the Corporation under the Plan. Yet another allegation was Applicant's failure to indemnify the Corporation from losses through payment of claims upon the guarantee fund arising through his defaults in completing or effecting repairs to homes he had undertaken to build.

Evidence before The Tribunal from a municipal building inspector indicated, in one house constructed by him, that Vecchio had not complied with the Ontario Building Code and that major structural deficiencies remained so that a municipal occupancy permit could not be issued in respect thereof. A list of defects included "settling, cracks in foundation walls, insufficient nailing in the frame, and unauthorized changes in plans from original drawings." A list of items needing attention included removal and replacement of flooring, straightening floor joists, re-installation of gyproc, doubling up of floor joists, repairs to leaking roof and correction of drainage around foundation by installing weeping tiles. A consulting engineer made an even more damaging report on the same house and a warranty inspector of HUDAC reported that it was doubtful if it was economically feasible to correct the 28 listed faults needed to bring it to Ontario Building Code standards and that in all probability it could be impossible to obtain fire insurance coverage for it.

Another house begun to be built by Applicant was reported already deficient in five respects.

Applicant, a tailor by trade, testified he had taken up construction as apprentice in 1955 and as general contractor in 1974 concentrating in house alterations, additions and repairs. In 1977, having purchased a lot with a house foundation already in place, he hired carpenters to frame and finish a house but a January storm ruined the floors and caused other damage for which he blamed the subtrades. He said he had no unfinished houses excepting one which he had withdrawn from the Warranty Program so that it could be used as a rental property. As for the house he had begun Applicant testified it was not in the Program having been started and sold before the Act had come into force.

The Tribunal found Applicant had a record of breaches of warranties, had shown he was not competent to build, or have built, homes to required standards or to repair or correct defective work.

ORDERED: The Registrar shall carry out his proposal to refuse renewal of registration and to revoke temporary status as such.

1 9 7 8

TORONTO

HEINZ WAHL CONSTRUCTION LIMITED

Jan. 11

Applicant
and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C. and
LOU RICE, MEMBERSCOUNSEL: ARTHUR BARAT for Applicant
BRIAN M. CAMPBELL for Respondent

JANUARY 11th, 1978

Applicant required a hearing into the Registrar's proposal to refuse Applicant registration and to revoke its provisional registration as a builder for purposes of The Ontario New Home Warranties Plan Act, 1976 ("the Act"). The Registrar alleged a lack of such financial responsibility as is required by section 7 (1) (c) of the Act, in that its current financial statement reflects the Company is in a deficit position and that the personal net worth of the owner of the business offered in support of his personal guarantee of the Company's performance was only \$20,000. No probative evidence was offered to refute such allegations.

The Tribunal's decision given orally without reasons was that the Registrar's proposal should be carried out with immediate effect.

ORDERED: As above.

1 9 7 8

TORONTO

Apr. 24

HELEN WELSBY CONSTRUCTION

Applicant
and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
MRS. HELEN J. MORNINGSTAR and
STEPHEN PUSTIL, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

APRIL 24th, 1978

Applicant required a hearing under section 9 of The Ontario New Home Warranties Plan Act 1976 ("the Act") in response to the Registrar's proposal to revoke its temporary registration status and to refuse to grant registration under the Act. The reasons cited by the Registrar for his actions were that, having regard to Applicant's financial position, it could not reasonably be expected to be financially responsible in the conduct of its undertakings as provided in section 7 (1) (a) of the Act, its failure to respond satisfactorily to the Registrar's reasonable demands for information (as to Applicant's qualifications as a residential house builder) as provided in paragraph 9 (3) 5 of the Regulations made under the Act and for failing to complete work required to be done under a contract for the construction of a house and finally for receiving moneys in excess of the cost of the work performed contrary to such contract.

The Applicant failed to appear at the opening or within 30 minutes thereafter and was not represented at the hearing which was thereupon proceeded with. Evidence was received in support of the Registrar's allegations as above stated and showed that (1) an unverified statement of net worth of the sole proprietor, Helen Welsby, submitted to the Registrar indicated assets of \$92,500. less liabilities of \$24,200. for a net worth of \$68,300. and (2) that a dispute between Applicant and owner of the house, the building of which was the subject of the contract referred to above, was unresolved and (3) that the said house was not completed and a mechanics lien had been filed against the property by an unpaid supplier.

The Tribunal directed the Registrar to carry out his proposal to revoke the temporary registration status of Applicant and to refuse registration for the reasons he had found against Applicant.

ORDERED: As above.

1 9 7 8

TORONTO

Sept. 22

WILLIAM PETER AYLWARD

Applicant
andREGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
RespondentTRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
C.C. HILLMER and MAURICE LAMOND,
MEMBERSCOUNSEL: PETER J. WILEY for Respondent
APPLICANT - in person

OCTOBER 12th, 1978

A hearing was required by Applicant when he was refused registration as a salesman by the Registrar under the Real Estate and Business Brokers Act ("the Act") for stated reasons, namely, that Applicant's past conduct afforded reasonable ground for the belief that he would not carry on business in accordance with law and with integrity and honesty and further, that having regard to his financial position, Applicant could not reasonably be expected to be financially responsible in the conduct of business. It was alleged, in particular, that Applicant had been convicted of fraud in connection with his activities while he was manager of a trust company office and while registered as a real estate salesman. Regarding his present financial position it was alleged he was indebted to a number of persons and that there were unsatisfied judgments outstanding against him.

Applicant, aged 31, married with two dependant children, had first been registered as a salesman in December, 1973 and had been in the employ of three trust companies until his registration was terminated in April, 1978. In his written sworn application for registration Applicant disclosed a conviction in January, 1978 against him for fraud involving \$6,000. and unsatisfied judgments amounting to \$7,000.

Facts before the Tribunal indicated Applicant had filed for personal bankruptcy in July, 1978, a month after he had made application for registration, and was presently undischarged. His debts at such time were approximately \$12,000. Applicant had served part of a five month sentence before being paroled on the recommendation of the trial judge who found extenuating circumstances in that the accused had brought his defalcation

the notice of his employer, that he had an otherwise clear record and in fact had a good employment record.

Testifying in his own behalf Applicant stated his employer had been able to repay itself through claiming on the proceeds of the foreclosure of the mortgage on his home which he had improvidently agreed to purchase when he could not afford it. He insisted his mistake had been more one of judgment than dishonesty and that the audit control at his branch had been very inadequate over the funds he had temporarily "borrowed". He had fully expected to be able to return the funds "borrowed" when the office was closed on short notice thus cutting off any opportunity to do so.

The Tribunal found the Registrar had been justified in concluding Applicant could not be expected to be financially responsible and that his past conduct indicated he would not carry on business within the law, honestly and with integrity and thus concurred in the Registrar's proposal.

ORDERED: The Registrar shall refuse registration to Applicant.

1978

TORONTO

PETER L. BEZEMER REAL ESTATE INC.
and PETER L. BEZEMER

Mar. 28
Apr. 21

Applicants
and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS ACT
Respondent

TRIBUNAL: J.C. HORWITZ, O.C., CHAIRMAN
H.F.H. SEDGWICK and
HELEN MORNINGSTAR, MEMBERS

COUNSEL: JAMES DUNHAM for Applicants
PETER WILEY for Respondent

MAY 16th, 1978

The Registrar gave notice pursuant to section 9 of The Real Estate and Business Brokers Act ("the Act") of his proposal to revoke the registrations of the registered brokers Peter L. Bezemer Real Estate Inc. ("Inc") and Peter L. Bezemer ("Bezemer"), the president and director of Inc. The registrant appealed to the Tribunal requiring a hearing into the proposed revocations pursuant to section 9 (4) of the Act. The Registrar stated in his proposal that the past conduct of Bezemer afforde him reasonable grounds for his belief that the registrants would not carry on business in accordance with law and with integrity and honesty and that he was carrying on activities that were or would be in contravention of the Act. The past conduct complained of was that Bezemer had failed to transfer to Inc.'s trust account certain deposit moneys as required by section 31 of the Act and the activities deemed to be in contravention of the Act were that such deposit moneys were converted by Bezemer to his own use and part thereof remained unpaid to the rightful claimant who had been forced to sue to judgment for same. In addition to the foregoing the Registrar found registrants could not reasonably be expected to be financially responsible (as required by section 6 of the Act) since there were alleged to be judgment executions outstanding against Bezemer of over \$31,000.

At the outset Applicants' counsel admitted all allegations above stated excepting as regards the failure to transfer the \$5,000 of the deposit moneys resulting in a shortage in Inc.'s trust account and the allegation raised for the first time at

ce hearing that Bezemer had refused or neglected to produce
te Applicants' financial records for purposes of an inspec-
ton by the Registrar after repeated requests and demands,
ntry to section 26 of the Act. Bezemer's explanations
re that, as regards the \$5,000. deposit, he claimed the
rchaser making such deposit had agreed Bezemer could use
ll as an advance on his commission and, as for the latter
complaint, the Department of National Revenue (Taxation) had
squeestered their records in connection with an inspection of
plicants' income tax and had retained them unduly. In fact
sch records were finally made available to the Registrar.

The Tribunal did not accept the foregoing explanations
ad found that there were then two executions outstanding
ainst Inc. aggregating \$5,867 and 15 executions outstanding
ainst Bezemer totalling \$31,886. It further found the allega-
ton of breaches under section 31 proved. It found the past con-
uct of the Applicants was such as to justify the Registrar in
eming to the opinion that Applicants were not financially res-
onsible and would not carry on business in accordance with law
ad with integrity and honesty.

ODERED: The Registrar shall carry out his proposal to revoke both
oker registrations.

1978

TORONTO

June 9.

JOSEPH CASTIGLIONE

and **Applicant**

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS ACT
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and
ROBERT G. WAY, MEMBERS

COUNSEL: PETER J. WILEY for Respondent
APPLICANT in person

JUNE 22nd, 1978

Applicant was refused registration as a real estate salesman for purposes of The Real Estate and Business Brokers Act ("the Act") by notice of proposal of the Registrar dated May 1, 1978 followed by his statement of particulars dated May 23, 1978. Applicant required a hearing into the Registrar's proposal which was made on the ground that Applicant could not reasonably be expected to be financially responsible in the conduct of his business (section 6 (1) (a) of the Act) since it appeared there were, as of May 2, 1978, writs of execution outstanding against him personally aggregating approximately \$39,000.

Evidence presented on behalf of the Registrar indicated the Applicant had first been registered as a real estate salesman in 1971 followed one year later by registration as a real estate broker which subsisted until terminated in March 1974. On reapplying for salesman registration in January, 1978 he was met with requests from the Registrar, repeated over a number of months, for information as to his financial position and specifically an audited financial statement. In January 1978 Applicant submitted a self-prepared statement of his net worth which the Registrar found unacceptable as did the Tribunal with the added comment that Applicant was bankrupt even if not so declared. Applicant had gone on a "holiday" to Florida for six months during the winter of 1975/76 and on his own testimony had endeavoured to establish himself there as a real estate broker without success.

The Tribunal found Applicant was not financially responsible as witness the numerous judgments and law suits pending against him for debt and that he had sworn falsely in his application under review saying he has been unemployed for three previous years.

ORDERED: The Registrar shall carry out his proposal to refuse registration to Applicant.

1 9 7 8

TORONTO

Oct. 17, 18

19, 20, 25, 2

Nov. 1, 22,

23 & 24

DIAL M.S. REAL ESTATE LIMITED
and MARIO SCONZAApplicants
andREGISTRAR OF REAL ESTATE AND BUSINESS BROKERS ACT
RespondentTRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
CAMERON C. HILLMER and
W.J. BINGLEY, MEMBERSCOUNSEL: N.W. TOMAS for Applicants
A.N. MAJAINA for Respondent

DECEMBER 14, 1978

The Registrar proposed to revoke the broker registrations of Applicants, Sconza, a broker registered since June, 1963 ("Sconza") and Dial M.S. Real Estate Limited, his wholly-owned corporate broker ("Dial M.S.") pursuant to section 6 of The Real Estate and Business Brokers Act ("the Act") on the grounds permitted by subsection (1) that the past conduct of Applicants commencing as early as 1973 had been such as to afford the Registrar reasonable grounds for the belief that their real estate business would not be carried on in accordance with law and with integrity and honesty and collectively that, if permitted to continue as registered brokers, their activities will be in contravention of the Act and the regulations thereunder. Such contraventions as alleged were of the following sections of the Act and paragraphs of the Regulation

- i. of section 42, by a course of conduct over a long period in purchasing or in causing to be purchased through a salesman-employee, interests in real estate without having simultaneously delivered to vendors a written statement disclosing their capacity as broker and/or salesman and that such acquisitions were for purposes of resale;
- ii. of section 30(1) by failing to keep, or failing to keep available for inspection, trade record sheets and proper books and accounts as prescribed as to form and content and to enter therein the minimum particulars specified, such omissions, in the Registrar's opinion, amounting to

offences under section 63 (1) (a) of the Act, that is to say, furnishing "false information... in any statement..." required to be furnished by the Act or Regulations;

- iii. of paragraph 20 (3), of the Regulations under the Act, by failing in many instances, to deposit in the broker's trust bank account deposits within two banking days of receipt deposits received in their hands in trust for other persons;
- iv. of section 31 (1), by failing to keep deposited funds held in trust separate and distinct from Applicants' own funds which consequently gave rise to shortages in Applicants' trust account from time to time; and of said section, in making disbursements of trust funds contrary to the terms of the trust pertaining thereto;
- v. of section 4 (2) in failing to provide the supervision of a registered broker of each branch office;
- vi. of section 3 (1)(c), in permitting a salesman operating a branch office to act on behalf of the Applicants in trades of real estate and of section 41, in permitting such salesman to act on behalf of brokers other than the Applicants and to receive commissions from such other brokers;
- vii. of section 63 (1) (a), in furnishing false information in applications for renewal in 1975, 1976 and 1977 in failing to disclose the existence of court judgments for money registered against them and remaining outstanding;
- viii. of section 31 (2), in failing to pay over to the Treasurer of Ontario moneys held by them for more than one year after the person for whom it is held became entitled to payment thereof when such person cannot be located and such failure persisted after repeated demands by the Registrar beginning in 1975.

The Registrar further alleged Applicants had failed in numerous instances to observe the duty imposed upon them by law if agency in not acting in the best interests of their principals by failing to disclose Applicants' capacity in purchases of real estate by them for the purpose of resale, and in failing to prevent, or in allowing, their employee-salesman to do so.

Instances of the foregoing allegations were very fully documented with particularity by the Registrar in his reasons. It appeared that, beginning in January 1973, a series of three inspections about two years' apart of the Sconza, and subsequently, Dial M.S. operations were carried out resulting in

reports to the Registrar and, in consequence, his demands upon the brokers to correct the irregularities referred to above. However complaints were forwarded from the Registrar over an even longer period.

Sconza, 51 and married with four children, had emigrated to Canada in 1952 becoming a real estate salesman in 1956 and continuing as such until 1963 when he first received broker registration. He incorporated the brokerage as Dial M.S. in 1972, licensed it and continued as broker himself. The operation was very successful from the start growing to four offices and 70 employees at one time. It remained throughout a "one-man show" and Sconza worked with a small staff which was at times considerably over-worked as he himself admitted. He hired outside accounting services upon which he depended to keep his books in order through inspections every six weeks or so.

At the outset of the hearing Applicants admitted the Registrar's allegations numbered:

- (ii) section 30(1)(e) of the Act - failing to record deposits received and disbursements thereof;
- (iv) section 31(1) of the Act - failing to keep deposited trust funds separate from Applicants' funds and in making unauthorized disbursements thereof.

Sconza further admitted having transferred sums from his trust account into bank deposit receipts - in one instance the sum of \$350,000. in the name of Dial M.S. and again the sum of \$30,000 in the same manner. After being reproved by the Registrar, he transferred \$20,000 from the trust account to a bank deposit receipt in name of "Dial M.S. Real Estate Limited Trust Account". All three transfers were found by the Tribunal to be in breach of section 31 (1) of the Act and an Information Bulletin issued by the Registrar to all members of the industry.

Regarding allegation (i) the Tribunal found it to be proved, notwithstanding Sconza's assertion that the salesman he had placed in charge of a branch office was acting on his own initiative and without the authority of Sconza (who claimed to have no knowledge of it) when he effected purchases of land in which he held an interest without disclosure to the vendors contrary to section 42 of the Act. Indeed in one such trade Sconza himself was a partner with his salesman and there was no disclosure as required. Sconza was personally in breach of the section in another transaction when he bargained to purchase on his own account without disclosure.

The Tribunal made no finding respecting allegation vii) above - that Applicants were guilty of furnishing false information in renewal applications contrary to section 63(1) a) of the Act and accepted Sconza's statements that any lack of information supplied was done unconsciously.

Regarding allegation (viii) Tribunal found against Applicants, that is, that they had failed to pay over to the reasurer of Ontario moneys held by them in trust for more than one year after the person for whom it was held became entitled but could not be found, contrary to section 31 (2) of the Act.

Regarding allegation (iii) the Tribunal found Applicants were guilty of breaches of Regulation 20(3) in failing to deposit in their trust bank account sums deposited with them within two banking days after receiving same.

No findings were made with respect to allegations (v) and vi), the evidence having indicated that Applicants now operate from one office. There was an abundance of evidence as to the good character and honesty of Sconza and no complaints from the public had been received. The Tribunal found substantially proved the general allegations of breach of duty by Applicants' agents to their principals in the matter of want of full and fair disclosure. The Tribunal concluded that its findings afforded reasonable grounds for a belief that Applicants did not carry on business in accordance with law or with integrity. The Tribunal found the root of most shortcomings by Applicants in their lack of proper supervision of staff and of single-handed management not capable of running so large a business. For these reasons Applicants were permitted to continue in business on restrictive conditions including the retention of a competent manager for one year, regular accounting to the Registrar of their trust funds, future good behaviour and that the Applicants provide the Registrar with a \$100,000 term deposit certificate payable to the Treasurer of Ontario maturing February 29, 1980 to be subject to forfeiture on breach of conditions.

ORDERED: Registrar's proposal to revoke Applicants registration changed to conditional continuance of registration.

1978

TORONTO

Oct. 12

GERALD M. FOSTER

Applicant
andREGISTRAR OF REAL ESTATE AND BUSINESS BROKERS ACT
RespondentTRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS and MAURICE LAMOND
MEMBERSCOUNSEL: JOHN A. TURINGIA for Applicant
PETER J. WILEY for Respondent

OCTOBER 27th, 1978

By notice to Applicant the Registrar proposed to refuse him registration as a salesman under The Real Estate and Business Brokers Act ("the Act") on both the grounds mentioned in section 6 (1)(a) and (b), that is to say, that having regard to his financial position, he could not reasonably be expected to be financially responsible in the conduct of his business and that his past conduct affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. In a further statement of particulars to Applicant the Registrar furnished a number of reasons for reaching the foregoing conclusions. These consisted of allegations that Applicant had been declared a bankrupt on three occasions, that there existed a writ of execution against him amounting to \$3,511., and that Applicant had sworn falsely in affidavits in support of three separate applications for registration denying his former or present bankrupt condition. Further, it was alleged, Applicant had failed to disclose an earlier bankruptcy when applying for discharge from a subsequent bankruptcy.

Evidence adduced by the Registrar indicated Applicant had first become registered under the Act as a real estate salesman for a year commencing in April 1952 and as a broker in May 1953 terminating in August 1955. There followed a series of applications, transfers and terminations over the next twenty-two years. Evidence proving substantially all allegations made by the Registrar was brought forward and Applicant, in taking the stand, was unable to explain his many derelictions in misstating or failing to state the truth in sworn statements to

the Registrar and to the Bankruptcy Court. Each of the three bankruptcies indicated substantial losses to secured and ordinary creditors alike. The Tribunal found the Registrar was justified in concluding that Applicant should not be registered.

ORDERED: The proposal of the Registrar to refuse registration is to be carried out.

S. D. HACKING REALTY LTD.
SUSAN DARLENE HACKING
KENNETH WILLIAM HACKING
HAROLD SYDNEY HACKING

Feb. 7,
8 & 9

Applicants
and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and JOSEPH STRUNG,
MEMBERS

COUNSEL: A. N. MAJAINA for Respondent
APPLICANTS in person

MAY 30th, 1978

Applicants S.D. Hacking Realty Ltd. ("the Realty Company") and its president Susan Darlene Hacking ("S.D. Hacking") were refused registration as brokers and Kenneth William Hacking ("K.W. Hacking") and Harold Sydney Hacking ("H.S. Hacking"), directors of the Realty Company, were individually refused registration as salesmen therefor in a proposed decision of the Registrar given with very fully detailed reasons. The Registrar proposed further to revoke the subsisting registrations of all three individuals as salesmen to a presently registered broker on the same grounds which may be summarized as follows: 1) S.D. Hacking and her husband K.W. Hacking had failed in their duty to disclose and had furnished false information to the Registrar concerning the true facts surrounding the control of Kehare Realty Limited ("Kehare") and in thus procuring its registration as a broker controlled by an individual registered broker when in fact S.D. and K.W. Hacking held absolute voting control; 2) S.D. and K.W. Hacking, by means of and through Kehare, traded in real estate as brokers while registered merely as salesmen, contrary to section 3 (1) (a) of the Act and to act on behalf of a corporate broker while not themselves registered brokers contrary to section 3 (1) (c) and to effect a change in its officers without the consent of the Registrar, contrary to section 3 (3) of the Act; 3) section 7, dealing with registration of broker corporations was breached in that Kehare should not have been registered as a broker having regard to where the true voting control of Kehare lay (section 7, subsection (1) (a) and (c));

4) K.W. Hacking, a salesman, acquired more than 10% of the voting rights of Kehare contrary to section 7 (4) (a);
5) S.D. and K.W. Hacking breached section 32 (1) (b) of the Act in failing to notify the Registrar of changes in the officers of Kehare and section 32 (2) (b) in failing to cause Kehare to notify the Registrar of the termination of employment of its registered broker; 6) S.D. and K. W. Hacking breached section 37 (traded as brokers without notification to the Registrar), section 38 (held themselves out as brokers, directly or indirectly), section 41 (traded in real estate as brokers while merely employees of Kehare and accepted compensation as brokers) and finally, 7) S.D. and K.W. Hacking submitted numerous applications containing falsehoods and in returns and notices to the Registrar. It was generally alleged that S.D. and K.W. Hacking had, as a result of the foregoing, damned, deceived and misled the clients of Kehare and it could therefore be concluded that their past conduct and the conduct of H.S. Hacking as one of the incorporators and a director of Kehare was such as to afford reasonable grounds for belief that all individual Applicants and hence the Realty Company which they intended to operate, would not carry on business in accordance with law and with integrity and honesty as required by section 6 (1)(b) and (c) of the Act or that the Applicants are or will be carrying on activities that are, or will be, in contravention of the Act.

After two days of testimony the parties to the hearing informed the Tribunal that agreement had been reached as to the terms acceptable to the Applicants which would govern their registrations when issued, as follows:

in the case of S.D. Hacking Realty Ltd. its application is abandoned indefinitely; in the case of S.D. Hacking, after two years, she may apply for registration as broker and she shall not meanwhile trade in real estate; in the cases of S.D. Hacking and H.S. Hacking respecting their registrations as salesmen, each shall post a bond of, or security for, \$5,000. for a period of two years forfeitable for contravention of the Act or above condition; in the case of K. W. Hacking, his registration as salesman is suspended for one year and thereafter his application for re-registration shall be supported by a bond of, or security for, \$5,000. and he shall not meanwhile trade in real estate.

ORDERED: As above.

1978

LONDON, 19

Oct. 3, 4,

Dec. 5, 6 8

1978 - Jan:

18 & 1

TORONTO - J

WALTER HERMAN HESKAMP

and **Applicant**

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
W. W. EVANS, and
MERVIN L. HIMES, MEMBERS

COUNSEL: R.J. FLINN for Applicant
A.N. MAJAINA for Respondent

MARCH 9th, 1978

Walter Herman Heskamp ("Heskamp") and W. Heskamp Real Estate Limited ("the Heskamp Company"), the former as proprietor broker of the latter, were notified of the Registrar's proposal of his intention to revoke their registrations as brokers. By the same notice the Registrar gave notice to Carla Adeline Gough ("Gough"), a salesman registered to the said brokers, of his proposal to revoke her registration. All three parties required a hearing pursuant to section 9 of The Real Estate and Business Brokers Act ("the Act"). A hearing date appointed was postponed several times at Gough's request and finally fixed to be commenced on a date not suitable to her on stated medical grounds and consequently she effectively withdrew from the hearing by surrendering her salesman registration. The Heskamp Company likewise withdrew from the proceedings by surrender of its licence and the hearing was thus limited to an investigation into the Registrar's proposal to revoke Heskamp's personal broker registration.

The Registrar's proposal as against Heskamp alleged past conduct that would disentitle him to continue his registered status, conduct indicating he would not carry on business in accordance with law and with integrity and honesty or, alternatively that if permitted to continue his activities, would place him in contravention of the Act. The charges levelled by the Registrar involved Heskamp, the two former registrants who had withdrawn as above-mentioned and one M. Paul Downs ("Downs"), a solicitor who, it was alleged, was involved jointly in the

operations of the other three sometimes as legal adviser, sometimes as financial adviser or financial agent to vendors and purchasers of residential and commercial real estate handled by Heskamp and the two other registrants.

Heskamp, married and 48 years of age, had first been registered in 1969 as salesman and in 1970 as a broker operating a prospering brokerage employing as many as five salesmen by 1975. Heskamp caused the Heskamp Company to be incorporated in 1975, he becoming its president and his wife as secretary-treasurer, and the company received its brokers registration later the same year. Still later in 1975 Heskamp agreed with Downs and Gough to sell them 39% and 10% respectively of the issued stock of the Heskamp Company to be transferred immediately and, upon the event of Gough receiving her broker registration, to sell and transfer the remainder of his stock to Downs and Gough in the ratio of 10% and 41%. Gough's nominee in such transaction was his sister and Heskamp, it was agreed, would remain as representative broker until the event mentioned and afterwards as an employee for short term. Heskamp covenanted not to compete, to leave his licence, to sell the residence-office building to the Heskamp Company when the final purchase price for business, good will, office equipment etc. would be paid and the purchasers would buy from Heskamp and his wife the mortgage and promissory note they held against the residence-office building. Thus Heskamp rendered himself a captive broker and, until Gough's registration as broker was secured, Heskamp would end the appearance of operating the brokerage and controlling Gough as salesman as required by the Act. Arising from these arrangements as disclosed by his investigation, the Registrar alleged in his proposal that Heskamp had failed to declare to the Registrar the transfer of control of the Heskamp Company and he continued to show himself as holding voting control in applications for renewal of his and the Heskamp Company's registration, contrary to section 63 (1) (a) and the Tribunal so found. Following upon the aforementioned agreement, Heskamp continued to operate the Heskamp Company but did not prevent Gough from trading as a broker, contrary to section 3 (1)(a) of the Act and the Tribunal so found, and Gough became a director of the Heskamp Company, contrary to section 3 (3) of the Act and the Tribunal so found. Heskamp had moreover permitted, if not actively arranged, a non-permitted change in the voting control of the Heskamp Company contrary to section 7 (1) (a) of the Act and for Gough to hold more than ten percent of the voting rights therein, contrary to section 7 (1)(c). Moreover Gough's appointment as an officer of the Heskamp Company was not notified to the Registrar, contrary to section 32 (1)(b) and the Tribunal so found. Together Heskamp and Gough were alleged to have operated an unregistered brokerage through their use of an incorporated

company in transactions contrary to section 3 (1)(c) of the Act and the Tribunal so found. It was further alleged Gough was permitted by Heskamp, as broker in charge of the Heskamp Company, to hold herself out, directly or indirectly, as a broker although not so registered, contrary to section 38 of the Act and the Tribunal so found. Included in the proposal were general allegations against Heskamp that he knowingly permitted or actively connived with Gough to trade in real estate as a broker under the umbrella of his registration thus defeating the underlying purpose inherent in the scheme of the Act that a qualified broker shall control the activities of a brokerage in the public interest and the Tribunal so found.

Particulars were furnished by the Registrar of five transactions carried out through the Heskamp Company, three by Gough one by Heskamp and one by both of them. Allegations against Gough and found proved by the Tribunal included:

- in one case, preparing a listing agreement without date or vendors' signatures contrary to sec.43(3); failing to deliver same to vendor contrary to sec. 46 (1) and (2)(c); delivering to a person acquiring a business an unaudited and incorrect statement of assets and liabilities of the business which did not contain mention of existing liabilities in the form of mortgages and a promissory note aggregating \$46,243 contrary to sec. 44; in securing acceptance of an offer which was irregularly completed and lacked information important to the purchaser such as the mortgages existing against the property and in failing to obtain sufficient executed copies of, and to deliver same, to all parties thereto, contrary to sec. 47;
- in another case, Gough caused a corporation in which she had an interest to purchase a property without making such disclosure to the vendor-client or obtaining his admission of knowledge of her capacity and interest in the transaction, contrary to sec. 42; in failing to furnish her client with a written statement of representation made by her to him, contrary to sec. 35; and in acting for the purchasing corporation which was not itself registered as broker contrary to sec. 3 (1) (c);
- and in another transaction, Gough was alleged to have failed in her fiduciary duty of trust to her client, proved incompetent in carrying out her responsibilities as salesman and in obtaining execution and in making delivery of the offer and acceptance to all parties to a transaction, contrary to sec. 47.

Allegations made and proved against Heskamp included a breach of section 46 in failing to properly complete a listing agreement and to properly complete and deliver the related offer and acceptance, the execution of which by the purchaser was obtained through Heskamp's representation that a condition herein was satisfied when it was not; and a breach of sec. 44, failing to deliver to a purchaser of a business the required financial statements pertaining thereto and a breach of sec. 35 in failing to provide such purchaser with a signed statement of a representation made by Heskamp to procure financing.

In the sale of a farm the listing agreement obtained by Heskamp was not completed or delivered in accordance with sec. 4 and, with the co-operation of Gough, he obtained acceptance of an offer to purchase by Downs with the knowledge (not communicated to the vendor) that a severance of the property which considerably enhanced its value would be granted. The Tribunal found such conduct by Heskamp and Gough was in breach of their duty as agents acting for the vendor. In other transactions the Tribunal found as alleged that Heskamp and Gough, acting in concert, had arranged purchases by Downs and by persons standing in blood relationship to Gough without disclosure to the vendors of their identity or relationship thus failing in their fiduciary duty as brokers and agents. In all such matters Heskamp was held accountable by the Tribunal for the conduct of the salesman Gough and for his failure to provide supervision.

In the result the Tribunal found the Registrar had reasonable grounds for his belief that Heskamp would not, if permitted to continue his registration, carry on business lawfully and with integrity and honesty. The Tribunal however noted that most of his difficulties stemmed from the activities of his salesman, Gough.

ORDERED: The Registrar shall carry out a suspension of Heskamp's registration for a two-year period.

E. LOMBARDI REALTY LIMITED
and EDWARD LOMBARDI

Applicants
and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
H.F.H. SEDGWICK and JAN JUSTIN,
MEMBERS

COUNSEL: PAUL J. SCHRIEDER for Applicants
PETER J. WILEY for Respondent

MAY 10th, 1978

Applicants applied to the Tribunal for relief from the proposed order of the Registrar refusing them registration as real estate brokers for purposes of The Real Estate and Business Brokers Act ("the Act"). The Applicant Edward Lombardi ("Lombardi") had been a registered broker as lately as April 1977 having received his first broker registration in 1973, and had been first registered as a salesman in 1968. He had caused E. Lombardi Realty Limited ("Lombardi Realty") to be incorporated in June 1977 becoming its president and only director. Lombardi and Lombardi Realty applied for broker registration in October 1977, the latter for the first time and the Registrar's refusal, now under review, was based on his finding that the past conduct of Lombardi afforded reasonable grounds for a belief that the Applicants would not carry on business in accordance with law and with integrity and honesty (section 6(1) (b) and (c)ii). The past conduct cited was breaches of the Act by Lombardi in that he:

- (1) acted on behalf of Lombardi Realty in trades in real estate while neither was registered as broker, contrary to sections 3(1) (c) and 37;
- (2) held himself out as a broker contrary to section 38;
- (3) failed to set aside and hold in separate trust accounts moneys received in trust contrary to section 31 (1);

(4) issued or caused to be issued two cheques in the course of trading in real estate which were dishonoured, one for \$1,765 payable to Royal Trust Company which remains unpaid to the present.

Evidence received by the Tribunal substantiated the foregoing allegations. On the second day of the hearing counsel for all parties indicated to the Tribunal their wish to have the proceedings disposed of by a consent order pursuant to section 4 of The Statutory Powers Procedure Act, section 4 (b). The Tribunal agreed to making its order accordingly embodying the following terms:

That Applicants be not registered now but either may re-apply after two years, and that Lombardi may apply for salesman registration after one year, and finally that Lombardi pay to Royal Trust Company the sum of \$1,765. within six months hereafter.

ORDERED: As above.

1 9 7 8

TORONTO

NICOLAS STERJO MITRO

and

Applicant

Aug. 9, 21
25 & 28REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
RespondentTRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
JAN JUSTIN, MEMBERSCOUNSEL: ALLEN WEINSTEIN for Applicant
PETER J. WILEY for Respondent

SEPTEMBER 14th, 1978

Applicant was the subject of a proposal and amended proposal of the Registrar to revoke his registration as broker pursuant to section 9 of The Real Estate and Business Brokers Act ("the Act") because the Registrar found his financial position was such that he could not reasonably be expected to be financially responsible in the conduct of his business and because his past conduct as broker afforded the Registrar reasonable grounds for the belief that he would not carry on business in accordance with law and with integrity and honesty. In his statement of fact in support of the foregoing conclusion the Registrar cited a writ of execution in the amount of \$8,000 outstanding since 1975 against the Applicant, that he had operated a brokerage for more than one and a half years ending in June 1975 without having posted with the Registrar the required surety bond as required by Regulation 3 of the Act, that Applicant, with others, in 1975 had operated a real estate brokerage in the name of a corporation which had been dissolved, contrary to section 10 of The Business Corporations Act, and that Applicant had made false affidavits in support of his applications for renewal of registration in the years 1970 and 1971 concerning the existence of writs of execution and judgments against him. It was further alleged by the Registrar that Applicant was guilty of making false, misleading and deceptive statements by advertisements and circulars, contrary to section 60 of the Act by representing, suggesting or implying to prospective purchaser that Applicant offered for sale apartments as condominiums with all attributes that that word implies when, in fact, the nature of ownership of the apartments offered for sale was not that of condominiums as the laws of Ontario define them. Applicants required a hearing by the Tribunal in order to have the proposed order set aside or varied.

Applicant, 58, married with one defendant child, had first been registered as salesman in Ontario in 1957 and as broker in 1961 and, apart from numerous brief interruptions, not apparently due to any intervention of the Registrar, was more or less continuously engaged in the real estate business in the Toronto area for approximately 20 years.

Evidence before the Tribunal led to its finding that Applicant had filed false applications 1970, 1971, 1975, 1976 and 1977 including supporting affidavits made by him. The falsehoods included failures to disclose writs of execution against him and against his wholly-owned realty corporation as called for in applications made by him and on the corporation's behalf. The Tribunal also found Applicant had caused applications to be made on behalf of, and had received registration based thereon, of the said corporation and had carried on its business after such corporation had legally been dissolved. It also found his real estate operations had been carried on for approximately two years while there was no surety bond on deposit as alleged above.

The Tribunal heard considerable testimony concerning Applicant's operations in offering and selling, as condominiums, apartment units in a 147 suite building in Etobicoke. Approximately 47 units had been sold, the purchasers receiving on closing transfer of an apartment as "an undivided percentage interest" in the apartment building as tenants-in-common. Such transactions were carried out by means of offer to purchase and acceptance of a percentage interest coupled with obligations to share rateably in the expenses of operating the building and to maintain and repair the designated apartment unit being purchased. It was apparently the intention of the owners of the apartment building, who were having difficulty renting a large number of vacant apartments, to sell them much as owners of condominiums or co-operative apartment buildings do however with certain differences. An important difference was that purchasers of apartments already occupied experienced difficulty in gaining vacant possession possibly because of recent changes in Ontario landlord and tenant law respecting cancellation of leases enabling tenants to overhold and ignore notices to vacate. Applicant asserted he had legal advice before proceeding in the scheme, that almost all purchasers were satisfied although he had cheerfully refunded purchase moneys to seventeen dissatisfied purchasers.

He admitted the above-mentioned judgments and executions which he attempted to distinguish as not relevant to his real estate business or that he had recently personally discharged certain of them and was actively endeavouring to settle two by compromise. Regarding his failure to supply the required surety bond he said he had been ignorant of the omission but, in any case, no claims against him had gone unsatisfied during the material period of time. His financial position was

presently clouded by an income tax execution for \$81,827., repayment of a personal debt of \$10,000 and writs of execution against him amounting to \$115,723. As against these he claimed to have \$10,874 in a bank in Australia and a commission due to him of \$18,000 and would continue by compromise or arrangement to reduce the judgment debts outstanding against him. He blamed his solicitor upon whom he relied to file annual company returns to keep his corporation in good standing. Finally he claimed to have a current net worth of between \$180,000 and \$200,000.

Under cross-examination Applicant admitted the first meeting of the so-called "co-owners" of the apartment block had not yet been called as provided by agreement to be held within a stated period now elapsed. Regarding his failure to provide the statutory surety bond he could only say it wasn't, in his view, necessary and was surprised to be told that a judgment of \$8,000 against his brokerage corporation had been satisfied by the bonding company from his bond without his knowledge. He admitted having contemplated personal bankruptcy when his creditors were pressing and apparently endeavoured without success to persuade them to accept 20% settlements of their claims. He claimed his present debts amounted only to approximately \$10,000 apart from the income tax claims which he estimated, on advice, could be settled for much less than the \$81,000 claim.

The Tribunal found on the evidence that Applicant had been in breach of section 2 of the Regulations under the Act and of section 10 of The Business Corporations Act, and that he had furnished false information under oath in applications for registration all as alleged. On these grounds alone the Tribunal considered Applicant was financially irresponsible and that his past conduct indicated he would not carry on business in accordance with law and with integrity. The Tribunal refrained from making any findings regarding the allegations of false, misleading and deceptive representations in the sale of apartment as outlined above. The Tribunal did not accept Applicant's claims as to his net worth on the basis of his own statements. Because of his considerable experience in the industry the Tribunal was prepared to permit Applicant to continue to earn his livelihood therein once he has cleared away all executions judgments and debts. Registration when granted would be on terms to remain in place for two years, namely, upon good conduct, his real estate business would be subject to inspection of all books and records by the Registrar at all reasonable times and that he must furnish the Registrar quarterly with financial statements from his accountant and upon furnishing a surety bond or acceptable security in the amount of \$10,000 during such period subject to forfeiture if conditions breached.

ORDERED: As above.

1 9 7 8

TORONTO

June 28, 29

Sept. 5

Oct. 13

ROBERT VAN WOELDEREN

Applicant

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS

Respondent

RIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
CAMERON HILLMER and
SADIE MORANIS, MEMBERS

COUNSEL: J. DAVID HELSON for Applicant
PETER J. WILEY for Respondent

NOVEMBER 30th, 1978

By notice of proposal with reasons dated 23rd January, 1978 supplemented by statement of further particulars dated 9th May, 1978 the Registrar sought, pursuant to section 9, to revoke Applicant's registration as a salesman under The Real Estate and Business Brokers Act ("the Act"). The Registrar in making such proposal relied on section 6 subsection (1)(b) which disentitles an individual from registration whose past conduct is such as to afford the Registrar reasonable grounds for a belief that he will not carry on business in accordance with law and with integrity and honesty. The conduct complained of was that Applicant had, in a number of transactions in 1973 and 1974 while registered as salesman, purchased or caused to be purchased interests in real estate for the purpose of resale without first making disclosure of such facts to the vendors contrary to section 42 of the Act. With respect to such transactions it was further alleged Applicant had, as agent for the vendors, failed in his fiduciary duty to his client in each case. The allegation was made of the breach of section 47 requiring salesmen, when securing acceptance of an offer, to obtain sufficient copies of the agreement of purchase and sale from the parties and to retain one executed copy for each party to such transaction. Certain other allegations, either later withdrawn or not proved, were included by the Registrar in his statement of further particulars as well as an allegation of breach of fiduciary duty to a vendor in not informing such vendor before permitting him to enter into an agreement for the sale of his property, of an existing opportunity to sell such property more advantageously. Applicant availed himself of his right to a hearing by requiring such pursuant to section 9 of the Act.

Applicant, aged 36, had first been registered as salesman under the Act in May 1969 and was thereafter employed by a series of brokers including a trust company real estate department. Testimony from numerous witnesses established that Applicant in 1973 had begun to speculate in real estate through intermediaries - another real estate salesman, a business consultant and a bus driver. Short term profits were made on fairly quick turnovers which were split with such intermediaries. Applicant, remaining in the background, concealed his interest in purchase and the deed was taken in the name of the intermediary "in trust" or "to uses", Applicant protecting his interest by appropriate legal arrangements with the intermediary. Land values were rising and it was not established in evidence that the unsuspecting vendors in most cases did not receive fair prices. Applicant seemed familiar with a sure-fire method of obtaining mortgage financing including payments of "finders' fees" in cash put through a lawyer to the manager of a trust company mortgage department. Applicant and one of the intermediaries joined in forming a corporation to hold land each taking an appropriate share percentage. All these arrangements pointed toward a deliberate plan by Applicant to avoid the effect of section 42 of the Act requiring disclosure to vendors by brokers and salesman on acquisition of interest in real estate acquired for resale and the Tribunal found there had been non-disclosure in five of six transactions where it ought to have been made. The Tribunal also found Applicant had failed in his duty as agent to his principals to act honestly and loyally by withholding vital information. The Tribunal further found Applicant guilty of a single breach of section 47 in the matter of obtaining sufficient copies of an agreement of offer and acceptance. In the result the Tribunal concluded Applicant's past conduct afforded reasonable ground for the belief that he would not carry on business in accordance with law and with integrity and honesty.

ORDERED: Applicant's registration as salesman shall be suspended for one year and, if re-instated thereafter, to be subject to conditions of good behaviour for one year.

TORONTO
Jan. 16 & 30

CANADA WORLD YOUTH / JEUNESSE CANADA MONDE

Applicant

and

BOARD OF TRUSTEES OF THE COMPENSATION FUND UNDER
THE TRAVEL INDUSTRY ACT

Respondent

and

SINGAPORE AIRLINES LIMITED

Third Party

RIBUNAL: J.C. HORWITZ, O.C., CHAIRMAN
H.F.H. SEDGWICK and VIC MASI,
MEMBERS

COUNSEL: R.W. COSMAN for Applicant
BRUCE McDONALD for Respondent
WILLIAM CLARKE for Third Party

MARCH 2nd, 1978

Applicant required a hearing under sections 15 and 15(a) of the Schedule to the Regulations made under The Travel Industry Act, 1974 ("the Regulations" and "the Act") following rejection of its claim for payment of \$18,721 presented to the Board of Trustees of the Compensation Fund constituted under the Act. Applicant is an incorporated non-profit organization with objects including the promotion of cultural exchanges between the youth of foreign countries and Canadian young people between 16 and 20 years and is funded by the Government of Canada. Singapore Airlines ("Singapore") was made a third party by specification of the Tribunal pursuant to section 15(a) (4) of the Schedule to the Regulations.

During 1976 Dionne, Applicant's Executive Director, negotiated on Applicant's behalf with Excelsior Tours of Spain Ltd. then carrying on the business of a travel wholesaler in Toronto and registered as such under the Act until March 1, 1977 when its registration was terminated presumably by unilateral action of the Registrar under the Act and for the reason that it had sometime in February 1977 ceased to meet its obligations. Applicant paid Excelsior the gross sum of \$136,521 in 1976 against travel invoices including two with which the Tribunal was concerned of \$14,441 and \$16,637 (U.S.) for air travel of two groups of Canadian young people to Indonesia and return. Excelsior, in turn, purchased for Applicant from Singapore air charters to Kuala Lumpur, Malaysia and Jakarta, Indonesia, respectively.

Excelsior paid the former sum but failed to pay the latter sum to Singapore when the travel wholesaler's cheque was returned n.s.f. On March 20th, 1977 Singapore made demand upon Applicant for payment of \$16,637 U.S. before it would honour its air tickets for 43 persons to return to Canada from Indonesia and Malaysia. Dionne was persuaded to pay Singapore the sum it demanded rather than see his charges stranded and no doubt because he was advised he could recover one set of travel costs from the Compensation Fund as a client of a participant who had paid such participant for travel services contracted for but not received. For its part, to explain its apparent threat of refusal to honour its tickets, Singapore relied on one of the Conditions of Contract reproduced on the reverse of its tickets, viz para. 8 (in part..."Carrier may refuse transportation if the applicable fare has not been paid" and in such Conditions passengers were referred to the "General Conditions of Carriage" which included (in Article 3 "Tickets" para 1) the following warning: "A ticket will not be issued and in any case Carrier will not be obliged to carry until passenger has paid the applicable fare..." As will be seen, the passengers' fares had been paid for to the travel wholesaler who had thereafter failed to pay the carrier. In these circumstances Singapore made it clear to Dionne that the 43 young people would not receive transportation unless Singapore was first paid.

The Tribunal found that Applicant had paid the travel wholesaler for, and received from it, valid travel tickets and that the travel wholesaler was, at the time it issued the tickets, the agent of Singapore and that Singapore ought to have honoured the tickets so issued. In fact, because Applicant met Singapore's demand for payment previous to the departure date the possibility of its refusal to carry was not realized. The local sales manager of Singapore, during his testimony, declined, when pressed, to state whether Singapore would have carried out its threat to refuse carriage but admitted that in most circumstances airlines do not refuse to honour valid tickets.

It was argued on the Third Party's behalf that Excelsior Tours was the agent of the Applicant, a finding which the Tribunal refused to make. It was observed Singapore had not sought to look behind Excelsior's credit over a considerable course of dealing until an avenue was opened through the Compensation Fund for Applicant to claim reimbursement for its loss through the failure of Excelsior.

The Tribunal refused to allow Applicant's claim on the basis that it had not been shown that Applicant would not have received the travel services from Singapore Airlines for which he had paid Excelsior and held tickets.

ORDERED: Applicant's claim for compensation is refused.

1978

TORONTO

July 19

VANDA BEAUTY COUNSELLOR

Applicant

and

BOARD OF TRUSTEES OF THE COMPENSATION FUND UNDER
THE TRAVEL INDUSTRY ACT, 1974

Respondent

IBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
ROBERT LACKIE, MEMBERSUNSEL: BRIAN M. CAMPBELL for Applicant
MICHAEL D. LIPTON for Respondent

AUGUST 8th, 1978

Applicant ("Vanda") negotiated with Excelsior International ("Excelsior") to provide travel arrangements on the Harry Islands for 220 of its sales personnel and some senior officials as part of an incentives program to take place in January 1976. Vanda arranged air travel for the group directly with a Spanish carrier departing Montreal January 8th and returning January 16th. Negotiations between officials of Vanda and a Vice-President of Marketing of Excelsior during the late summer and fall of 1975 were ended with written advice by letter to November 29th from Vanda advising Excelsior that the whole trip was cancelled due to "the unsettled political situation in Spain, Portugal and North Africa". Excelsior had required Vanda to deposit \$10,000 as an advance and, at the time of cancelling, Vanda requested early discussions with the Marketing Vice President of Excelsior with a view to "clearing up" financial matters. Apparently Excelsior avoided any direct meeting with discussion with Vanda officials until the late summer of 1976 by which time each party had placed matters in their solicitors' hands. Excelsior's solicitors offered to refund \$6,848. Through Vanda's solicitors supported by a claim for \$3,152. for disbursements and work in connection with the aborted trip which was met with a demand for an accounting for cash disbursements and time expended in relation to Excelsior's claim for \$3,500. under the heading of staff work on the plan over a span of 5 months. In the end Vanda sued and obtained a default judgment in November, 1977 for the full amount of its deposit viz \$10,000. and costs. Such judgment remaining unsatisfied, Vanda presented a claim upon the Compensation Fund which was refused

without reasons by the Trustees from which decision Vanda now appeals requiring a hearing under section 15a of the Schedule to The Travel Industry Act.

Evidence before the Tribunal established the foregoing facts and that it was the Travel Industry Registrar's opinion that the Board of Trustees' decision to reject Vanda's claim was influenced by the Board's view that Vanda had not exhausted all possible means of recovery. The Tribunal found that Excel was not registered as a travel wholesaler and hence was not a eligible participant in the Compensation Fund at the material times having only become so registered and eligible on March 1976. The Tribunal recalled that Vanda's advance payments to Excelsior were made in October and November of 1975 to secure the accommodations desired for January 1976. The Tribunal was moreover of the view and found that Vanda had not diligently pursued its claim and had rejected settlement by payment of \$6,848. offered. Moreover the Tribunal pointed out that no conclusive evidence of the bankruptcy or insolvency of Excelsior had been offered.

The Tribunal refused to allow Vanda's claim or any part thereof.

OT 59



CA24N

CC40

- C56

Summaries of
Decisions
Volume 8

Commercial Registration Appeal Tribunal



Ontario

Available from:
Ontario Government Book Store
880 Bay Street
Toronto, Ontario

or by mail from:
Ministry of Government Services
Publications Services
5th Floor, 880 Bay Street
Toronto, Ontario

COMMERCIAL REGISTRATION APPEAL TRIBUNAL

Chairman: John Yaremko, Q.C.

Vice-Chairman: Matthew Sheard

Members: Irwin Cass, Q.C.

Watson W. Evans, C.A.

Helen J. Morningstar

Cameron C. Hillmer

Registrar: Audrey Verge

1 St. Clair Ave. West, 10th Floor
Toronto, Ontario
M4V 1K6

(416) 965-7798

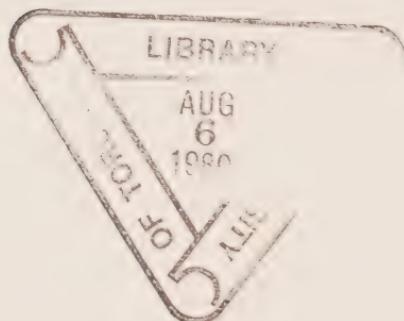
Summaries of Decisions

Volume 8



THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
SUMMARIES OF DECISIONS * - VOLUME 8
CITED 8 C.R.A.T.

* This volume contains summaries of, and in some instances full decisions and reasons given. If reference to the exact decision is desired application should be made to the Registrar.



Published pursuant to the Ministry of Consumer and Commercial Relations Act, Revised Statutes of Ontario 1970, Chapter 113.

THE COMMERCIAL REGISTRATION APPEAL TRIBUNAL
INDEX
SUMMARIES OF
DECISIONS
VOLUME 8

APPLICANTS

	<u>Page</u>
<u>Collection Agencies Act</u>	
Stevens, Alfred	1
<u>Consumer Protection Act</u>	
CBH Investments Inc., c.o.b. as Oshawa Provisioners, and Rubicon Distributing Limited	3
<u>Motor Vehicle Dealers Act</u>	
Snelgrove, Donald M.	13
<u>Ontario New Home Warranties Plan Act</u>	
Almond, D. R.	15
Bert Dobben Construction Company Ltd.	19
Burwell Construction Limited	20
C. Grigo Construction Ltd.	25
Castle-Hill Properties	26
Classic Custom Homes	29
C. Marzilli Construction Company Ltd.	30
DeRocchis, Mario	31
Dipasquale, Peter	34
Emerald Construction Sarnia Ltd.	36
Ernest L. Harper Limited	38
416043 Ontario Limited	41
Kaloni, P.N.	42
Kehoe, Frank & Margaret	44
Kovacs, Tibor & Piroska	50
Lenthall Homes	54
Malbar Construction Ltd.	55
Morningside Management Co.	58
McCollum, Gordon & Patricia	61
McDonagh, Ross	62
Palmerio, Joseph	62

	<u>Page</u>
<u>Ontario New Home Warranties Plan Act</u>	
(cont'd)	
Pastore, Luigi	69
Scime, Mr/Mrs. Michael	73
Stathakis, Steve	74
St. Onge, Gracien	81
Szorad, Martin & Ilona	84
Thomas, Glyn W. and Carol Thomas	86
252026 Investments Ltd.	26
345508 Ontario Limited	54
Village Homes 370827 Ontario Limited	90
Wade, Mr/Mrs. William	91
<u>Real Estate & Business Brokers Act</u>	
Alan D'Orsay Real Estate Ltd.	95
D'Orsay, Alan James	95
Cassidy, Joseph Patrick	96
<u>Travel Industry Act</u>	
Irani, Merwan B.	99
Ontario Motor League World Wide	103
Travel (London) Ltd.	

NOTES ON APPEALS FROM TRIBUNAL DECISIONS
TO SUPREME COURT OF ONTARIO
DIVISIONAL COURT

KEHOE, Frank & Margaret Appeal proceeding	8	C.R.A.T.	44
KOVACS, Tibor & Piroska Appeal proceeding	8	C.R.A.T.	50
McDONAGH and PALMERIO Appeal proceeding	8	C.R.A.T.	62
STATHAKIS, Steve Appeal proceeding	8	C.R.A.T.	74
STEVENS, Alfred Appeal proceeding	8	C.R.A.T.	1

ALFRED STEVENS
and
Applicant

REGISTRAR OF COLLECTION AGENCIES
Respondent

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MATTHEW SHEARD and
RONALD G. MEYER, MEMBERS

COUNSEL: FRANKLIN D. WEINSTOCK for Applicant
PETER J. WILEY for Respondent

DECISION: DECEMBER 10, 1979

The Applicant was registered as a collector under The Collection Agencies Act and was employed in that capacity by Creditel of Canada Limited from April 1, 1974 to September 18, 1974, and from November 15, 1974 to April 30, 1976. He was also registered as a collector under the Act and was employed in that capacity by Canadian Bonded Credits Limited from January 24, 1977 to September 28, 1978.

On May 28, 1979 the Applicant applied for registration again as a collector. On the 14 September, 1979, the Registrar of Collection Agencies issued a Notice of Proposal to refuse to register the Applicant since in the Registrar's opinion the Applicant is disentitled to registration under Section 6 of the Act in that the Registrar was of the opinion that the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

On the evidence before it, the Tribunal found that while attempting to collect debts owing to various clients the Applicant was rude, impolite and arrogant and used tactics designed to threaten and intimidate.

The Assistant Registrar of Collection Agencies testified that there had been a number of complaints in writing in the period 1974-1975 or later in the nature of misrepresentations, harrassing and threatening.

A former employer testified that the number of complaints against the Applicant was high and he had been warned to that effect.

The Tribunal finds that the past conduct of the Applicant as described by witnesses in this hearing affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty and directs the Registrar to carry out his proposal to refuse to register the Applicant as a collector under The Collection Agencies Act. *

* Note: The above decision was appealed to the Supreme Court of Ontario (Division Court). The appeal had not been concluded at the time of this publication.

CBH INVESTMENTS INC. carrying on business under
the name and style of OSHAWA PROVISIONERS
-and-

RUBICON DISTRIBUTING LIMITED, carrying on business
under the name and style of SHOP AT HOME FOOD SERVICES

Applicants

and

REGISTRAR OF THE CONSUMER PROTECTION BUREAU

Respondent

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
ROSS HUGHES, MEMBERS

COUNSEL: STUART M. PEIKES for Applicant
PETER J. WILEY for Respondent

DECISION: NOVEMBER 21, 1979

The Applicants requested a hearing before the Tribunal after receipt of the Registrar's Notice of Proposal dated the 27 February, 1979 to refuse to renew the registration of Oshawa Provisioners as an itinerant seller.

Oshawa's business involved the promotion and sale of what it refers to as a 'food plan' or a 'food plan service' whereby customers may order meat and other frozen grocery items in bulk for delivery to the home to be stored in a freezer.

In conjunction with the food plan, Oshawa also promotes the sale of food freezers and microwave ovens. Though the purchaser generally believes Oshawa to be mainly in the 'food plan' business, the sale of the appliances is an integral and important part of Oshawa's business. Initially Oshawa made a charge of \$295 (later increased to \$395) in conjunction with the purchase of any food plan alone. There was a period when no charge was made if at the time of the purchase of the food plan either a freezer or oven were purchased. Subsequently the charge was made irrespective of any other purchase(s).

Unknown to most of Oshawa's customers the food was supplied by an outside agency "Brock Farms" and not Oshawa.

The procedure by and large followed by Oshawa was as follows: Over a period of time Oshawa blanketed all apartments and townhouses between Pickering and Mississauga with promotional circulars, coupling that action with advertisements in newspapers, magazines, T.V. Guide, and on radio. Each form of advertising aroused the interest of anyone interested in saving on food costs.

The direct sales approach started when a contact was established with a prospective purchaser at a residence. Contact was established in a number of ways, of which the most common was the direct follow-up by Oshawa by telephone, or directly upon an inquiry to Oshawa by the recipient of a circular after a door-to-door distribution. On occasion the enquiry resulted because the interested party had seen a newspaper ad or had heard from someone else about the plan.

The Oshawa Salesperson carried out a sales pitch based basically on the conveying to the purchaser that participation in the food plan would bring about the elimination of the 'mark-up' or 'profit' involved in chain store food buying. The figure of 30% was used in a complicated series of computation leading to the appearance of savings which appeared remarkable.

Forms were used which gave the impression that a frozen food plan was being developed for the particular purchaser's family, whereas in fact, sets of pre-determined figures were utilized. There was the inference that sufficient food was being provided for the purchaser's needs for fewer dollars being spent within the plan. In reality the amount of food was considerably less. The cost of the food supplier (Brock Farms) was such that no real savings of the 'mark-up' could be effected. The savings were claimed to be so large that they could cover the cost of a freezer or microwave oven, in some cases, both.

Following the execution of the documents by the purchaser, the purchaser would realize shortly thereafter or invariably after the delivery of the food order, that the expected savings were in fact not there, and that there was a commitment to substantial payments at high interest rates.

A rare few carried out the rescission procedure of the Act, but most were not aware or became aware too late of the procedure.

The purchaser would then learn that the conditional sales contracts which they had signed had been assigned to finance companies, and that Brock Farms was the supplier of the food.

In support of the reasons set out in the Notice of Proposal and the details thereof, there was tendered evidence relating to experiences with Oshawa of some 12 families during the period May, 1977 to June, 1979.

The Tribunal finds that:

'the past conduct of its director, Colum B. Haugh, affords reasonable grounds for belief that Oshawa's business will not be carried on in accordance with law and with integrity and honesty.'

The pattern of action, the procedures and methods utilized by Oshawa in the consummation of transactions are such as to be the very opposite to that required by Statute for entitlement of registration. Basic to Oshawa's operation are the extravagant claims made related to the savings in the cost of food available to consumers who join the food plan. Those savings are not realized; indeed, generally the overall cost to the consumer is increased. The very beginning of the process - the promotional circular - sets the tone of the whole transaction. It is an eye-catching deception - it holds out the concept of great savings in food costs. It attracts the attention of those to whom such is of great concern - and then subsequent action not only fails to deliver, but continues in the deception.

It is very obvious that the business of Oshawa is to sign people to contracts. The Tribunal is of the opinion that the inuendo or impression given that there are savings of 30% chain store mark-up is a gross misrepresentation that is deceptive. The computations used are a device that completely distorts both the nature of the operations of chain stores and the food service that is to be supplied. It was clearly indicated that the overhead related to Brock Farms was not substantially less than that of the ordinary chain store operation.

The Tribunal finds:

'that there was no advantage given to purchasers in the payment of \$295 - \$395 membership fee.'

Any advantage was attainable without any charge by dealing directly with Brock Farms. The Tribunal is of the opinion that Haugh was not only aware of this but that the sales pitch was deliberately designed to begin this way to set the stage for convincing the prospect of the merits of the food plan that was to be presented.

The Counsel for the Applicants stated that since there was no evidence that supermarkets do not have a 30% mark-up, a statement in that respect could not be assessed as a misrepresentation. The Tribunal finds:

'that there is the inference that the 30% forms at least in large part the saving when the purchaser deals with Oshawa and that is the misrepresentation.'

The utilization by Oshawa of the food analysis sheet and of the order form distinctly give the impression that the transaction is being tailored to meet the requirements of that specific purchaser. Nothing could be further from the truth. The deal is one of several pre-determined packages. The use by Oshawa of the computations "your way" and "Oshawa Provisioners way" is deceptive. The order made which is related to the dollars assigned thereto is clearly insufficient for the needs of the prospect.

It is noted that the figure chosen for the "Oshawa Provisioners Way" was always significantly less than what was computed as the food value being obtained by the prospect through current purchasing.

The procedures relating to the food order form are a sham and almost meaningless. A pre-determined dollar total varied only to lend more credibility to the transaction. Brock Farms adjusts the order made to equate the dollar figure. There is no way that the prospect can determine for himself at the time of the purchase the quantity or cost per item of the food being purchased; the requisite information is never placed before him

nor left; indeed, the information is kept from him.

The delivery and packaging of the food delivered is such that it is virtually impossible for the purchaser to relate the food being delivered to the cost thereof. However, the Brock Farms catalogue order form price list with it has the necessary details in respect of item cost. For the first time it is possible for the purchaser to figure out the true cost of items, and in total, and to get some inkling of the quantity of food, but it is too late to cancel if dissatisfied.

The Tribunal makes no finding with respect to the worth of the freezers and ovens.

However, it is significant that they are expensive models and their purchase do not appear to be such as should be undertaken by persons under difficulty in meeting food costs. Appliances of such high cost are in the opinion of this Tribunal not consonant with guidance and counselling in a 'war against food costs'. The Tribunal finds that:

'few of the purchasers had any real appreciation of the total cost of the freezer with or without the additional charges because of the emphasis on the monthly payments'

The savings are dramatized and exaggerated to the degree that the purchasers count themselves extremely fortunate in having the opportunity of participating, and the enthusiasm with which some participated reflects this.

The purchasers are seldom capable by virtue of background, education and training, to comprehend the complicated sequence of computations that are made but they have no difficulty grasping the conclusions which are placed before them, for they are so significant. Anyone can compare a membership fee of \$295 with the 5-year chain store markup in the thousands of dollars. Anyone can comprehend the cost of 'their way' of shopping with the 'Oshawa Provisioners Way'; the figures are so significantly lower that it is easy to recognize which is the cheaper way.

All was initiated and continued with the full knowledge, approbation, guidance and supervision of Colum B. Haugh. The Tribunal finds that:

'CBH Investments operating Oshawa Provisioners is responsible for all actions and representations of Colum B. Haugh as its principal agent and through him for all actions and representations of its salespersons and other employees.'

Evidence accepted by the Tribunal support findings:

1. Oshawa's representative presents figures and performs calculations respecting the transaction in a manner that is incomprehensible or confusing to the participant.
2. Oshawa's representative makes continued reference to many different factors such as 'overhead', 'membership fee', 'markup' and their purported significance in calculating savings to the participants.
3. Oshawa's representative, in the filling out of the food order does not adequately inform the participant as to its contents, or alternatively does so in a manner that misinforms, misleads or confuses the participant and leaves false impressions with him. In fact, the participant does not receive a definitive copy of his food order until such time as the food is delivered to him.
4. Oshawa's representative deals with the provision of the food items and the food freezer and the oven in such a manner as to give the impression that they are all part of one and the same transaction or agreement and that these goods will all be provided directly to the participant by Oshawa itself.
5. Oshawa's representative frequently refuses, or fails to provide the participant with a price list respecting the food items being ordered and the participant does not obtain one until such time as the food has been delivered to the participant.
6. Participants are unable to determine the exact purchase price of the food items in relation to quantities which are being ordered because of the number and complexity of figures used by

Oshawa's representative. This problem is compounded by the confusion caused by the combined purchase of meat and poultry items, food staples and perishable goods as well as the freezer and oven, as the case may be. In particular, the participant is not able to ascertain the price he is paying per pound for each cut of meat.

7. If participants indicate that they would like further time to consider the transaction, they are told in effect, that it is not possible, and that they will have to make up their minds right away.

The Tribunal finds that Oshawa is carrying on activities that are, or will be if it is registered, in contravention of The Consumer Protection Act or the Regulations thereunder, in that:

The food order left with the prospect only contained generic terms in bulk and aggregate prices, so that it was not possible for the prospect on the night that the transaction was concluded to be aware of exactly what had been purchased by way of food stuffs and to be able to verify that delivery is made of what is ordered. On delivery the goods are not so described as to enable the purchaser to confirm that they are what were ordered. The order does not contain an itemized price of the goods in such a way that the prospect is able to ascertain the unit costs. This is not made available until the food is delivered, and in the meantime the 2-day "cooling off" period has expired.

For the record, the Tribunal is of the opinion that with some few exceptions the quality of the meat and foodstuffs delivered was not such as to give substance to any general allegation of misrepresentation with respect thereto. The Tribunal is of the opinion that the complaints about the quality of food were negligible in relation to the total amount delivered to all complainants.

The Tribunal is aware that a refusal to register is a drastic measure and that there is a necessity to balance the interests of the public with the interests of those who wish to participate in the business of itinerant sellers.

However, the Tribunal is of the opinion that there is a heavy responsibility on the part of those who wish to carry on business to meet both the letter of the law in the technicalities of transactions and in the spirit of the law governing business activities.

The Tribunal finds that the overall approach and attitude of Oshawa is to a large degree devoid of honesty and integrity. The methods utilized by Oshawa are misleading, deceptive, and unfair. The statements in the advertising and circulars, and the documents used in respect of the sales are full of misstatements and contradictions and reflect failure to disclose. The Tribunal is of the opinion that the business of Oshawa as carried on is not one that is carried on with honesty or integrity. Such characteristics are a condition precedent to registration as an itinerant seller and the Legislature has in this respect provided for the protection of the public under the circumstances of executory contracts being concluded in a home, where the conditions as between vendor and purchaser are substantially different from that in a retail store where the purchaser attends upon the vendor. The Legislature has clearly indicated that there are standards to be met by itinerant sellers if they are to carry on that type of business. The Legislature has recognized that the circumstances of sales within the home are not the same. The Consumer Protection Act and The Business Practices Act were passed for the protection of the public.

The Tribunal finds that in the operation of the business of Oshawa Provisioners the executory contracts thereof do not contain:

1. a description of the goods or services sufficient to identify them with certainty; contrary to Sec. 31(b) of The Consumer Protection Act
2. the itemized price of the goods or services; contrary to Sec. 31 (c) of The Consumer Protection Act.

The Tribunal finds that the methods of Oshawa Provisioners invoke acts which constitute unfair practices under The Business Practices Act in that there are made:

(A) false, misleading or deceptive consumer representations including:

1. representations that specific price advantages exist when they do not.
2. false or misleading representations that the proposed transaction involves certain rights and remedies.
3. representations using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive, and

(B) Unconscionable consumer representations in that

1. the consumer is not reasonably able to protect his interest because of.... inability to understand the computations involved,
2. there are made misleading statements of opinion on which the consumer is likely to rely to his detriment.

The Tribunal finds

that CBH Investments Inc. carrying on business under the name and style of "Oshawa Provisioners" is disentitled to registration under Section 5 of The Consumer Protection Act, R.S.O. 1970 c. 82 as amended and the Regulations thereunder as an itinerant seller for the following reasons:

" 5(d) C.P.A. Oshawa is carrying on activities that are, or will be if it is registered, in contravention of The Consumer Protection Act or the Regulations thereunder.

5(b) C.P.A. ... the past conduct of its officers or directors affords reasonable grounds for belief that Oshawa's business will not be carried on in accordance with law and with integrity and honesty."

and directs the Registrar to carry out his proposal to refuse to renew the registration of Oshawa as an itinerant seller under The Consumer Protection Act.

DONALD M. SNEIGROVE
and Applicant

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS, C.A. and
MURRAY FELDMAN, MEMBERS

COUNSEL: A.D. LEVY for Applicant
PETER J. WILEY for Respondent

DECISION: APRIL 27, 1979

The Applicant requested a hearing before the Tribunal after receipt of the Respondent's Notice of Proposal dated December 14, 1978, suspending the Applicant's registration as a motor vehicle salesman for a period of two calendar months from the 1st day of January to the 28th day of February, 1979 for the reasons stated therein.

The Applicant had been registered as a motor vehicle salesman in Ontario for about two and a half years and had been employed by various dealers.

The transaction complained of involved the purchase of a certain motor vehicle during the month of June, 1978, by a certain member of the public (referred to hereinafter as the customer) from the dealer by whom the Applicant was at that time employed in which the Applicant acted as salesman. It came to light that possible irregularities had taken place in the course of the transaction when the dealer's attempt to recover an ostensibly outstanding balance due from the customer was answered by evidence that the amount requested had already been paid to the Applicant.

The Tribunal found in the evidence as follows:

1. That the Applicant had withheld \$4,000 cash from the Dealer as well as the documentation of the transaction;
2. That the Applicant had been aware that any money he received from a purchaser was trust money;

3. That without colour of right he had converted at least \$600 to his own use; and
4. That the Applicant had contravened the Act's Regulation, section 16 (4) in that the sales orders or purchase orders did not show the signature of the person accepting the order on behalf of the motor vehicle dealer, the name and signature of the salesman, and the salesman's registration number, as well as contravening Regulation section 16 (6) in that he did not give to the purchaser when the order was accepted a duplicate original copy of the sales order of the motor vehicle with the original signature of the purchaser thereon.

During the course of the hearing the Tribunal heard character evidence on behalf of the Applicant from the Applicant's present employer, to the effect that the latter considered him a good and trustworthy employee and would continue to employ him notwithstanding what had been adduced.

The decision was as follows:

"The Tribunal taking into consideration the public interest including that of the Applicant and his family, and noting the confidence of his present employer, has come to the conclusion that a suspension must be imposed to serve as a deterrent to the Applicant and others who may be tempted to emulate the Applicant's behaviour."

"The Tribunal finds that the past conduct of the Applicant affords it reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and therefore Orders the Respondent to suspend the Applicant's registration as a motor vehicle salesman for the calendar month of July, 1979."

D. R. ALMOND

and

Applicant

THE CORPORATION DESIGNATED TO ADMINISTER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN
ACTING AS CHAIRMAN
HELEN J. MORNINGSTAR and
LOUIS A. RICE, MEMBERSCOUNSEL: H. E. MOSSER for Applicant
BRIAN M. CAMPBELL for Respondent

DECISION: DECEMBER 14, 1979

The Applicant had requested a hearing to enable the Tribunal to determine whether it should order the Corporation designated under the Act to effect certain repairs or renovations in respect to his property in Kincardine, Ontario, or to take such other action as might be deemed appropriate in respect to certain complaints and claims of the Applicant concerning his said property which had been lodged with the Corporation and rejected.

At the commencement of the hearing the Tribunal was advised by Counsel for the parties that the items in dispute had been limited, by way of agreement between them to two only, to wit, the concrete driveway and certain drywall installations both situate at the subject property.

The Applicant stated he had purchased his home from a builder and that upon taking possession in August, 1977, he had found, inter alia, both the driveway and the drywall to have been installed in a most unsatisfactory manner. It seemed clear to the Tribunal that the Applicant and his family, over a period well in excess of two years, had been obliged to sustain and put up with a very substantial, if not an unreasonable, amount of inconvenience and aggravation in connection with a series of construction defects. The Applicant impressed the Tribunal as a reasonable and patient individual who had shown goodwill and a willingness to compromise but who nevertheless felt a considerable sense of injustice in respect to his two items of complaint, the concrete driveway and the drywall panels situate inside his house and adjacent to the front door and stairhall. The drywall was said to be poorly installed and unsightly, having long uneven ridges which produced a displeasing effect upon the eye,

especially when viewed from the livingroom from whence they were disagreeably visible to the Applicant, his family and their guests.

More serious to the Applicant and, as it seemed to the Tribunal, was the condition of the concrete driveway which runs some 60 feet from the garage at the front of the subject building, across the fore-area of the property to the street. Photographs were introduced into evidence and it appeared that this drive had numerous defects, both aesthetic and functional. The edge was uneven and crooked, as though the cribbing had collapsed from the weight of the fluid concrete during pouring permitting it to flow out and later harden in a crude and unsightly shape. Expansion joints had been made by the builder after the concrete had hardened by means of a masonry saw. These consisted of crude, irregular and uneven cuts, at ten foot intervals, and apparently were made freehand without the use of a straight edge. Especially when viewed in conjunction with the crudely-poured edge, the effect of these upon the eye of the viewer was most unsightly, and the impression most likely conveyed to the mind of the viewer was that the drive had been constructed by an amateur or by one who either took no pride in the finished appearance of his work or was incompetent to perform it.

The testimony of the Applicant was reinforced by that of an expert witness, an experienced contractor and specialist in concrete work of many kinds of long standing, who had stated that saw cuts had been made in the drive in the area of where it adjoins the garage door, "amateurishly", and in what he called a "desperation move" to remedy the flow of water into the interior of the garage. Water had apparently flowed from the roof on to the surface of the drive while the concrete was still wet causing a sort of pitted trough to form at whose bottom the gravel of the foundation bed protruded visibly through the cement in a manner few would find pleasing to view. He further stated that this rain-made trough did serve the purpose of accommodating water which might otherwise have flowed in to the interior of the garage. Many other depressions had been observed by him where puddles, large and small, lay all over the surface of the drive in rainy weather. He had also observed that the grade of the drive was uneven so that, at its far end, it rose to meet the public roadway rather than descending smoothly to it so as to permit the run-off of water as would be the case with a well-built driveway constructed by an experienced contractor. Structurally he stated that the drive was sound; it would carry the weight of a motor vehicle passing back and forth upon it, but it was grossly lacking in "eye appeal", he said.

It looked as though the builder of this drive had been caught unexpectedly by the arrival of a cement truck with a load of cement and he had not had enough help to pour it properly before it hardened.

When asked if a coat of asphalt could provide the drive with a visually satisfactory appearance the witness said yes, but that the surface would be raised so that the garage door would no longer close and also the interior garage floor would then require to be raised. Most people would find the appearance of this drive very poor and it would detract both from the appearance and the value of the house to which it was a conspicuous appurtenance. He stated in reply to a question that the only way he knew of to rectify the situation was remove it by means of a back-hoe and truck to the dump.

The Corporation's technical representative, who had arranged, at the Applicant's request, to make an inspection on August 30th and had viewed the items of complaint and conceded the pitted trough near the garage was not very appealing but felt it served its purpose. Some saw cuts had been made which were sort of rough and the driveway as a whole was not very pleasant to look at but at least it worked, i.e. it served to convey vehicles from the street to the garage and back. The uneven surface was not particularly dangerous. The Corporation had not felt the problem to be a warrantable one but conceded under cross-examination that the driveway was unsightly and was the result of poor workmanship and that the value of the home was detracted from as a result. In view of the Tribunal these last two points are critical.

Counsel for the Corporation urged that the problems were cosmetic; albeit that they were displeasing to the owner they did not detract from the operation of the driveway. Throughout the Province of Ontario the Warranty Program could not be expected to replace every driveway or other structure or appurtenance that simply happened to be less visually attractive than it might be or to displease the owner from the standpoint of visual appeal. The Tribunal agrees with this. Generally speaking, mere "cosmetic" defects will not be covered by the Warranty Program. But each case should be judged upon its peculiar or specific facts and merits. In this case the Tribunal took note of the background of the Applicant's situation. It notes as well that the driveway is at the very front of the subject property, very conspicuous to the passing public, and very influential upon the impression that a prospective purchaser or other viewer would formulate as to the value or desirability of the home.

It notes that such impression is likely to be extremely negative and that it was stated by each of the witnesses that the value of the home was for practical and commercial purposes thereby likely to have been diminished.

In this case the Tribunal interprets the evidence to find as a matter of fact that the driveway in question is closely appurtenant to the home and is part of the home; and that the value of the Applicant's house has been seriously compromised and therefore the Applicant in this case has sustained a material as opposed to a merely aesthetic detriment such as to offend the warranty set out in Section 13 (1)(a)(i) of the Act, to wit, that the home shall be constructed in a workmanlike manner.

ORDERED: The Tribunal Orders and Directs the Respondent to remove the existing driveway and to provide the Applicant with a new concrete driveway which will be constructed and completed prior to June 15, 1980. The Tribunal makes no order respecting the drywall.

BERT DOBBEN CONSTRUCTION COMPANY LIMITED

and Applicant

THE REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES

THE ONTARIO
PLAN ACT

Respondent

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
JOHN C. HURLBURT, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

DECISION: JULY 17, 1979

The Applicant had requested a hearing after receiving notice of a Proposal from the Registrar under section 8 of the Act to revoke the registration of the Applicant under the Plan for the reasons set out on the back thereof.

Neither the Applicant nor Counsel on its behalf appeared at the hearing. Evidence of due service upon the Applicant of the Tribunal's Notice of Hearing was given.

The Tribunal then recessed the hearing for thirty minutes to allow for late arrival.

Evidence before it satisfied the Tribunal that the Applicant was in breach of the Act and directed the Registrar to carry out his proposal to revoke registration of the Applicant for stated reasons.

BURWELL CONSTRUCTION LIMITED

and

Applicant

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT

Respondent

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN
ACTING AS CHAIRMAN
CAMERON C. HILLMER and
JOHN C. HURLBURT, MEMBERSCOUNSEL: NEIL A. BURWELL Agent for Applicant
BRIAN M. CAMPBELL for Respondent

DECISION: DECEMBER 20, 1979

The Applicant had requested a hearing after receiving a Notice of Proposal dated July 19, 1979 under Section 9 of the Act, from the Respondent revoking its registration under the Plan for the following reasons:

" You have a record of breaches of warranties within the meaning of sub-section 8 (2) of the Act.

Failure to diligently perform or cause to be performed all obligations imposed on you under the Plan under any agreement by you with the Corporation in respect of the Plan.

Failure to indemnify and save harmless the Corporation and the insurer for the time being under any contract or contracts of insurance establishing the guarantee fund from any loss which they or any of them may suffer by reason of your failure to diligently perform or cause to be performed all obligations imposed on you under the Plan and under any agreement made by you with the Corporation in respect of the Plan.

Failure, without undue delay, to complete the construction of every home commenced by you in accordance with the Act.

" Failure to abide by conciliation decision
re Kovacs residence.

You are further notified that should any valid claims be presented to the Corporation by virtue of your inability to honour the provisions of the statute, then the Corporation can proceed by way of legal action against you for any valid claims which the Corporation was obliged to honour on your behalf. "

The Regional Manager for Hamilton of the HUDAC New Home Warranty Program, gave evidence for the Respondent. He testified that in July, 1977, his office had received from a Mrs. Iroska Kovacs, who, together with her husband, Tibor Kovacs, were the owners of a home known municipally as 100 Hadeland Avenue, Hamilton, and enrolled as number 3969, a copy of an undated letter which Mrs. Kovacs had sent to the Applicant complaining of certain items requiring to be corrected by the Applicant as builder/vendor of that home which Mr. and Mrs. Kovacs had purchased on January 15, 1977.

On July 14, 1977 the Warranty Program (or, more precisely, the Corporation designated to administer the Ontario New Home Warranties Plan Act), corresponded with the Applicant.

Although no reply appears to have been received by the Corporation to the correspondence, it appears that some effort to satisfy the owner was made by the Applicant during the course of the following months but these do not seem to have been successful because on May 2, 1978, the Corporation received a Request for Conciliation from the owners in which they repeated their complaints. These had to do with various defects in construction resulting in drainage problems, seepage, cracks and leaks of diverse kinds.

The Applicant was advised of the Request for Conciliation by letter dated May 3, 1978. No reply was received by the Corporation to that letter and on June 6, another letter was sent to the Applicant setting out a deadline of 14 days for commencement of the repairs and a caution that failure to undertake the work within the prescribed time, the Warranty Program may undertake whatever proceedings are necessary.

The Conciliation Decision, which was attached, as stated, was dated May 17, 1978, he further testified that when no reply was received from the Applicant to the Corporation's letter of June 6, 1978, he sent a further letter to the Applicant which stated, in part:

"...Take notice the Program now requires the work to be completed by July 10, 1978. Should you not comply with this final request do not undertake any further remedial action after July 10, 1978, as estimates will then be obtained for the completion of the work by others, at your expense...."

The letter and the ultimatum set forth in it was ignored by the Applicant. The Corporation then proceeded to gather in the estimates referred to in that letter in order to have the necessary work done by other contractors in the way stated.

It appeared from the testimony that getting the work done was not an easy task. It seems likely, from the testimony of the Applicant that the builder may have attended at the site on one or more occasions while the work was in progress. Whether the effect of these attendances was to impede the work in progress is not clear but the Tribunal is satisfied, as a finding of fact, that the Applicant made no meaningful attempt at any time to discharge its responsibilities under the Conciliation Decision or to perform the remedial work as was encumbered upon it by its terms and that such work was done by other contractors through the efforts of the Corporation and that this was necessitated by circumstances which were the fault of the Applicant.

On May 17, 1979, having expended \$4,565 on remedial work at the Kovacs residence, the Corporation sent the following letter by Registered Mail over the signature of its Litigation Officer stating:

" Enclosed please find an invoice dated May 15, 1979 in the amount of \$4,565. being sent by THE WARRANTY PROGRAM to your attention regarding payment made by THE WARRANTY PROGRAM on your behalf in respect of a CLAIM by an OWNER, which claim you have failed to honour in accordance with the provisions of THE ONTARIO NEW HOME WARRANTIES PLAN ACT, 1976, and

in accordance with the VENDOR/BUILDER AGREEMENT you signed with THE WARRANTY PROGRAM.

If you do not make payment by cheque within SEVEN (7) days of the above date with respect to this invoice, we will have no alternative but to instruct our Solicitor to institute the necessary LEGAL ACTION for the collection of this outstanding amount. "

This communication was also ignored by the Applicant and the amount claimed against it by the Corporation remains outstanding at this time. On July 19, 1979, the Proposal of the Registrar, proposing to revoke the Applicant's registration under the Warranty Program, was sent to the Applicant and on August 10, 1979, the Applicant's Notice of Appeal to the Tribunal, dated August 7, 1979, was received. It may be of interest to note that this document appears to be the only written communication ever received from the Applicant contained in the record before us.

The Applicant was represented at the hearing by its principal, who presented both testimony and argument on the Applicant's behalf.

His position seemed to be that the homeowners in the case principally complained of were extremely demanding and difficult for him to deal with on a personal basis. However, testimony was made that this case was not the only one in which the Corporation had had extreme difficulty with the Principal and his company; at least one other problem case was under way and the Applicant had displayed the same disinclination to reply to the Corporation's correspondence or to cooperate in any way.

The Tribunal was not favourably impressed by the Applicant's attitude during the hearing, which was blustering and belligerant. He seemed to look upon the New Home Warranty Program with great scorn. He stated that the amounts laid out by the Corporation in effecting the necessary remedial work were excessive, that he could have done it for a lot less. This may be so, but the fact is that he did not, although repeatedly requested to do so, and the charges his company have been requested to pay in no way reflect the time and trouble of the Corporation's personnel in arranging and supervising the work. He stated that he had no intention of reimbursing

the Corporation and would wait until he was sued, possibly at that time paying into Court an amount equal to what he felt the work was worth. This, no doubt, is his privilege.

The Tribunal had little difficulty in determining that the Respondent's Proposal was extremely well-founded.

ORDERED: The Registrar by this Order is directed to carry out his proposal and so revoke the registration of the Applicant under the Plan.

C. GRIGO CONSTRUCTION LTD.

and

Applicant

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS, C.A. and
LOUIS A. RICE, MEMBERSCOUNSEL: BRIAN M. CAMPBELL for Respondent
FRITZ GRIGO - Agent

DECISION: APRIL 20, 1979

The Applicant had requested a hearing after receiving a Notice of Proposal from the Registrar under Section 8 of the Act refusing to renew its registration and revoking its registration:

"Having regard to your financial position you cannot reasonably be expected to be financially responsible in the conduct of your undertakings as required by paragraph 7 (1)(a) or subparagraph 7(1) (c) (i) of the Act..."

in that the financial statement submitted shows a deficit in excess of \$18,000.

At the close of the hearing the Tribunal gave their decision orally at the request of the parties.

"The Tribunal agrees with the Proposal of the Registrar to revoke and not renew the registration of the Applicant and directs the Registrar to carry out his proposal."

252026 INVESTMENTS LTD.
carrying on business as
CASTLE-HILL PROPERTIES

and **Applicant**

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT

Respondent

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MATTHEW SHEARD and
LOUIS A. RICE, MEMBERS

COUNSEL: E.P. MASHIN - Agent for Applicant
BRIAN M. CAMPBELL for Respondent

DECISION: AUGUST 24, 1979

The Applicant had requested a hearing before the Tribunal after receiving the Notice of Proposal from the Respondent under Section 9 of the Act refusing to grant it registration having regard to its financial position it could not reasonably be expected to conduct its undertakings as required by section 7 (11) (a) and 7 (11) (c) (i) of the Act.

The Finance Manager, on behalf of the Respondent, testified the Applicant's unaudited financial statement showed an accumulated deficit in excess of \$200,000. A statement of operation for the year ended December 31, 1977 showed a net loss in excess of \$100,000 including depreciation; losses were also indicated in 1976.

Trade references were unfavourable.

The registration fee cheque in the amount of \$350 which was returned by the bank N.S.F. was later replaced by the Applicant.

The Respondent wrote to the Applicant on March 12, 1979 requesting a guarantee from the Applicant's principals because of the shareholders equity deficit disclosed by the aforesaid financial statement as well as an up-to-date letter of reference from the Applicant's bank. No such letter from the Applicant's bank was received; a statement of the Applicant's net worth as at December 31, 1977, prepared by his C.A. was submitted with a cautionary notation it had not been verified by the accountant.

The Respondent was not satisfied with the strength or adequacy of the Applicant's financial position for its purposes of

the Warranty Plan as disclosed by any of the materials supplied. He pointed out the deficit. There were no current liquid assets of any value; there was no cash, no bank balance. There were immediate liabilities in excess of \$90,000. A history of the operation showed a difficult position worsening. Even if the net worth was accepted in its totality as stated without question as to the real worth of the assets there was still an overall deficit.

The Respondent was not willing to accept the figures shown in the net worth statement as the values of the investment properties as these were simply theoretical. It was not the Respondent's policy to accept such assessments of estimated or appraised market value for the purpose of the Warranty Plan; the Respondent relied only upon cost values.

The Applicant's principal shareholder in testimony could not prove that there was not a substantial deficit at the end of 1977 or that this was not greater than a substantial deficit existing at the end of 1976. He offered no evidence as to the Applicant's position at the end of 1978, viz whether the trend towards increasing deficits had been reversed, whether there had been a deficit at all at the end of 1978, and if so, how large, or what the current situation was.

Counsel for the Respondent cited the Tribunal's decision in re Falconhurst Construction (Oakville) Limited, Volume 7 of C.R.A.T. page 26, as supporting the Registrar's position with respect to non-acceptance of market values for current assessment of financial responsibility. In the light of its findings, the Tribunal does not believe it necessary to deal with such submission.

However, the Tribunal does not accede to the argument on behalf of the Applicant that the Applicant is not truly in a deficit cash position because the current market value of its assets far exceeds its costs.

The Tribunal is of the opinion that the Respondent's opinion as to the Applicant's financial strength and responsibility are reasonably founded. It is significant that the deficit position is worsening, and that presently the Applicant is not carrying out all of its financial obligations satisfactorily. The occurrence of the N.S.F. cheque, the lack of cash, and high current obligations, coupled with the deficit shown in the financial statement even if viewed in the context of the principal's net worth, and that in its totality, convinces the Tribunal that having regard to the deficit financial position, the Applicant

cannot reasonably be expected to be financially responsible in the conduct of its undertakings and the Tribunal so finds.

It should be noted that the Tribunal has dealt with the application as presented to the Registrar herein.

ORDERED: The Registrar is directed to carry out his proposal to refuse the registration of the Applicant.

CLASSIC CUSTOM HOMES, DIVISION OF
NEIL JONES REALTY LTD.

and Applicant

THE REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT

Respondent

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
JOHN C. HURLBURT, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent
NEIL JONES - Agent

DECISION: JULY 17, 1979

The Applicant had requested a hearing after receiving notice from the Registrar proposing to revoke its registration under the Plan.

After perusal of documentary evidence and upon hearing representations on behalf of the parties, the Chairman delivered an oral decision on behalf of the Tribunal, namely:

Upon consent of the parties the Registrar is directed to carry out his Proposal to revoke the registration of the Applicant unless the Applicant submits to the Registrar by 12 noon, on August 1st, 1979 a statement of personal net worth of Neil Jones and a personal guarantee of the said Neil Jones as are required by and are satisfactory to the Registrar.

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN
ACTING AS CHAIRMAN
WATSON W. EVANS, C.A. and
STEPHEN PUSTIL, C.A., MEMBERS

COUNSEL: ROBERT B. MUNROE and J.P. ROCCHI
for Applicant
BRIAN M. CAMPBELL for Respondent

DECISION: OCTOBER 23, 1979

The Tribunal, in the presence of both parties, hereby orders that the Proposal of the Registrar dated June 21, 1979, be upheld unless within 60 days, the amount of \$11,000 is paid by the Applicant to the HUDAC New Home Warranty Program.

AND it is further ordered that upon completion of the Vella and Golfi residences warranty defects within a reasonable time in accordance with decisions dated November 27, 1978 and March 5, 1979 respectively, the Warranty Program will conduct an inspection and satisfy itself that completion is in accordance with the provisions of the Ontario Building Code and both houses conform to the Golfi Conciliation Decision dated March 5, 1979, including installation of 1/4" plywood under-lay.

MARIO DE ROCCHIS
and
REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT
Applicant
Respondent

TRIBUNAL: JACIE C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
STEPHEN PUSTIL, MEMBERS

COUNSEL: ALLAN PAPERICK for Applicant
BRIAN M. CAMPBELL for Respondent

DECISION: FEBRUARY 28, 1979

The Applicant had requested a hearing before the Tribunal after being informed by the Hudac Corporation that it had refused to pay the entire claim of the Applicant amounting to \$16,500 which it had allegedly paid by way of deposit to the builder for the purchase of property in the Municipality of Scarborough.

In this case the Applicant was the sole shareholder and operator of a corporation known as Demi-Concrete and Drain Limited (D.C.D.) which had done concrete and drain work for a builder on a 42-unit condominium project at \$1,100. per unit. Before the project was finished the builder went bankrupt but before that happened the Applicant and his wife entered into a contract of purchase and sale with the builder to purchase one of the units. It appeared that part of the "deposit" referred to in that contract was a "credit" of \$11,800 being monies owed by the builder to the Applicant's concrete and drain company for work done on the project. The total of all "deposits" was said to have been \$16,260 with (in addition to the said figure of \$11,800 by way of credit for the set-off debt) \$4,460 having been paid in actual cash.

The Applicant did not receive title to the subject property, which had been warranted under the Act, because the builder went bankrupt before this could happen. He claimed the full sum of \$16,260 from the Compensation Fund under Section 14 (1)(a) of the Act which reads as follows:

" Where a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for

financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

The person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations."

Section 6 (1) (ii) of the Regulations reads as follows:

"A purchaser who does not become an owner and who has a claim under clause (a) of subsection 1 of Section 14 of the Act in respect of a purchase agreement is entitled to be paid out of the guarantee fund, for all damages against the vendor for financial loss, an amount equal to all deposits owing by the vendor to the purchaser under a purchase agreement in respect of a condominium dwelling unit."

Section 1 (j) of said Regulations reads in part as follows:

" "deposit" means, in respect of a home, all moneys received (the Tribunal's underlining) before the date of possession by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement, and, in the case of a condominium dwelling unit, includes moneys received by or on behalf of the vendor after the date of possession and prior to the date of transfer..."

Counsel for the Applicant argued that the doctrine of estoppel applies as the Applicant was prejudiced when he signed Exhibit 8 and lost mechanic lien rights as he felt his contra account had been paid. The Tribunal notes that the mechanic lien rights were those of Demi Concrete and Drain Limited and not that of the Applicant. It also notes that the Tribunal cannot invoke the equitable principle of estoppel as it is not a court.

The Corporation had paid the Applicant \$4,460 only from the fund and the Applicant had refused to accept this, sending back to the Corporation its cheque.

The Tribunal made the following findings on the evidence:

- (1) That the Applicant through his company, D.C.D., paid to the vendor.builder the sum of \$4,460 which was money received by the vendor from the Applicant as a purchaser on account of the purchase price payable under the purchase agreement;
- (2) That the contra account of \$11,800 was not a deposit within the meaning of the definition section of the Regulations as it was not money received by the vendor from the Applicant as a purchaser on account of the purchase price payable under the purchase agreement; and
- (3) The contra account of a third party cannot by the definition be equated to a deposit received by the vendor from the purchaser.

ORDERED: That the Respondent pay the Applicant the sum of \$4,460.

PETER DIPASQUALE

and

Applicant

REGISTRAR UNDER THE ONTARIO NEW HOME
WARRANTIES PLAN ACT

Respondent

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN
ACTING AS CHAIRMAN
WATSON W. EVANS, C.A. and
LOUIS A. RICE, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

DECISION: SEPTEMBER 12, 1979

As neither the Applicant nor his Counsel appeared, the Tribunal delayed the hearing for thirty minutes and then proceeded to hear the matter after evidence was given of proper service of the Notice of Hearing.

The Applicant, through his solicitor, had requested this hearing after receiving Notice of Proposal dated June 21, 1979 under Section 9 of the Act from the Respondent refusing to renew his registration under the Plan for the reasons set out on the back thereof.

After perusing all the documentary evidence and hearing the viva voce evidence tendered, the Tribunal concluded that the Applicant, who had constructed a new home which was conveyed pursuant to the Purchase Agreement dated March 22, 1977 between the Applicant and purchaser, was in breach of a Conciliation Decision dated March 1, 1979 in that he failed to effect the necessary repairs to the subject premises as required therein and that he was further in breach of Conditions 3 and 4 of By-law 2 of the Regulations made under the Act (the Corporation having been obliged to disburse the sum of \$1,950 to effect repairs necessitated by the Applicant's said breach and which sum remains outstanding). The Tribunal further concluded that the Applicant was also in breach of Section 4.4 (2) of the Vendor/Builder Agreement entered into by him with HUDAC New Home Warranty Program on April 12, 1978 in consequence of the foregoing.

The Acting Chairman delivered an oral Decision on behalf of the Tribunal as follows.

The Tribunal accepts the evidence of the Respondent and, seeing no alternative, the Tribunal accedes to the submissions of the Respondent's Counsel and orders the registration of the Applicant revoked in accordance with the Respondent's Proposal.

The Tribunal's Decision is hereby confirmed and the Registrar is directed to carry out his Proposal as of this date to revoke the registration of the Applicant.

EMERALD CONSTRUCTION SARNIA LIMITED

and

Applicant

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT

Respondent

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN
ACTING AS CHAIRMAN
WATSON W. EVANS, C.A. and
STEPHEN PUSTIL, C.A., MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

DECISION: OCTOBER 29, 1979

As neither the Applicant's representative nor its Counsel appeared, the Tribunal delayed the hearing for 30 minutes to allow for late attendance and then proceeded to hear the matter after evidence was given of proper service of the Notice of Hearing including the warning that, in the event of non-attendance, the Tribunal would proceed without further notice.

The Applicant, through its solicitor, had requested this hearing after receiving Notice of Proposal dated May 3, 1979, under Section 9 of the Act from the Respondent refusing to renew its registration under the Plan for the reasons set out on the back thereof.

The Tribunal heard *viva voce* evidence from a technical representative of the Warranty Program and from the Program's Litigation Officer, and perused a considerable quantity of documentary evidence.

The Tribunal finds that the Applicant failed to provide the Respondent with an adequate financial statement or with an adequate personal guarantee as requested; that the Applicant issued three cheques to the Respondent which were returned marked "N.S.F." and failed to replace the same and that the Applicant has generally failed to demonstrate that having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertaking as required by the Act.

The Tribunal finds that the Applicant has established a record of breaches of warranties within the meaning of subsection 8 (2) of the Act, particularly in respect to a new home constructed and conveyed to a purchaser in Sarnia and enrolled under the Warranty Program, and in respect as well to a new home constructed and conveyed to a second purchaser situate in Sarnia and enrolled under the Program, as well as in respect to other serious matters connected to new homes which remain presently pending.

The Applicant has failed to reply to correspondence from the Respondent or to indemnify the Program for monies laid out by the Respondent in effecting necessary repairs pursuant to the Warranty Program although demand has been duly and repeatedly made.

The Tribunal finds that the Applicant is in very serious, aggravated and continuing breach of its responsibilities under the Program and has demonstrated a contemptuous and unco-operative attitude.

The Tribunal orders and directs that the Applicant's registration be revoked forthwith in accordance with the Respondent's Proposal.

ERNEST L. HARPER LIMITED

and
ApplicantREGISTRAR UNDER ONTARIO NEW HOME WARRANTIES PLAN
ACT

Respondent

TRIBUNAL: MATTHEW SHEARD, VICE CHAIRMAN,
AS CHAIRMAN
WATSON W. EVANS, C.A. and
STEPHEN PUSTIL, C.A., MEMBERSCOUNSEL: ERNEST L. HARPER - Agent for Applicant
BRIAN M. CAMPBELL for Respondent

DECISION: NOVEMBER 14, 1979

The Applicant had requested a hearing after receiving a Notice of Proposal dated July 9, 1979, under Section 9 of the Act from the Respondent refusing to renew its registration under the Plan upon the grounds of: record of breach of warranties; failure to perform its obligations to the Corporation and under the Plan; failure to indemnify the Corporation for its outlay and loss arising from the Applicant's non-performance of necessary repairs.

It appeared from its evidence that the Applicant had constructed a house with a septic system which, having been the subject of a "use permit" issued by the local Health Unit, subsequently and within the warranty period, failed to work properly. The Applicant, in essence, refused to repair it and denied liability to do so on the grounds that the Health Unit's "use permit" absolved him from further responsibility in respect to the septic system once it had been issued.

Repair work was completed at the expense of the Warranty Program. The total sum expended by the Corporation to effect this work stands in the amount of \$3,394 and the Applicant failed to indemnify the Corporation for that outlay.

In his argument, Mr. Harper contended that his company was entitled to rely upon the "use permit" as though this were an absolute and total discharge in his favour of all further responsibilities in the matter.

In the opinion of the Tribunal the septic system was not properly functional prior to the completion of the additional work done at the Corporation's expense and the Applicant was wrong in taking the position that its responsibility to put same into properly functioning condition had been extinguished by the "use permit" issued by the Health Unit, or otherwise.

The Health Unit issued its permit to use upon the basis of its inspection which was perforce to some extent superficial reflecting the inspector's best experienced judgment, yet based, in the nature of things, upon appearances rather than upon the solid evidence of successful performance over a reasonably lengthy period.

It was a permit to proceed to use the new home or that part of it covered by the Health Unit's inspection - but it was not a warranty of the septic system or some sort of insurance policy in favour of the builder or anyone else.

As a builder, Mr. Harper will have to clearly settle in his mind the fact that a "use permit" is just what it purports to be - a permit to use. It is like a green light or a "proceed" sign held by a flagman. If the apparent conditions prompting its issuance should suddenly or unexpectedly change or turn out to be other than what they had seemed at first to be, as when the functions of some new thing begins to develop in an unsuitably or totally improper way - due, for example, and as in this case, to causes which were invisible to the eye of the person making the primary inspection - then use must be discontinued and the problem, whatever it may be, set to rights.

Responsibility for it rests with the person in charge, and, in a house construction project, that person is the builder. He is responsible both to the new homeowner and to the Warranty Program during the full period of the warranty.

The members of the Tribunal were well-impressed with the demeanour of Mr. Harper in giving his testimony and presenting his argument: he seemed a clearly honest man who sincerely believed in and was rather stubbornly clinging to a point of view which in fact was palpably untenable. The Tribunal notes that his company promptly and readily corrected the other complaints evidently to the full satisfaction of the new homeowner as well the Regional Manager's generally favourable view of his competence as a builder and businessman. It also notes that at least one other builder had similar problems with drainage in the same sub-division, due, no doubt, to the specific and difficult character of the soil and rock conditions obtaining in that place.

However, the Tribunal finds the responsibility for the necessary repairs in this case belonged very definitely and unavoidably to the Applicant and must be assumed by it.

The Tribunal finds that the cost of these repairs was in the sum of \$3,394 and that such sum is due and payable to the Corporation by the Applicant.

The Tribunal ORDERS that the Registrar is directed to carry out his proposal to revoke the Applicant's registration under the Plan unless, on or before the 31st day of December, 1979, the Applicant shall have reimbursed the Corporation the full sum of \$3,394 as aforesaid.

416043 ONTARIO LIMITED

Applicant

and

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT

Respondent

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, C.A. and
JOHN CORSI, MEMBERSCOUNSEL: MARTINA VANDER LINDEN - Agent for Applicant
BRIAN M. CAMPBELL for Respondent

DECISION: NOVEMBER 15, 1979

The Applicant had applied for registration under the Act. The Registrar issued a Notice of Proposal pursuant to Section 9 of The New Home Warranties Plan Act to refuse the application on the grounds that the Applicant had been unable to supply financial statements and that a new worth statement of the principal, which was submitted, was inadequate in respect of the requirements set out in Section 7 of the Act.

The net worth statement of the President and only shareholder of the Applicant showed that the net worth of that principal shareholder could only be definitely stated at \$6.000.

The Tribunal found, in the absence of any financial statement from the Applicant corporation, that the principal's net worth was inadequate to fulfill the requirements of Section 7 of the Act and the Registrar was correct in his expectation that the Applicant could not reasonably be expected to be financially responsible in the conduct of its undertakings.

ORDERED: The Tribunal directs the Registrar to carry out his proposal to refuse to register the Applicant.

P. N. KALONI
and
Applicant

THE CORPORATION DESIGNATED TO ADMINISTER THE ONTARIO
MEW HOME WARRANTIES PLAN ACT
Respondent

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
CAMERON C. HILLMER and
JOHN C. HURLBURT, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

DECISION: AUGUST 21, 1979

The Applicant had requested a hearing before the Tribunal after receiving in respect of a claim being asserted by him, a letter on the letter-head of the Corporation, signed by the Technical Representative in the Kitchener Regional Office:

" This letter is in regards to your claim which I have inspected and validated on Monday, May 4, 1979.

However, I regret to inform you that it has been found not valid and therefore not covered by the New Home Warranty Program."

The Applicant had taken title to the property on October 3, 1978. As evidenced by a warranty certificate, possession of the dwelling had been taken on March 18, 1977. Accordingly, the warranty provisions applicable during the first year had expired on March 18, 1978.

The Applicant was advised the remaining four years of the warranty was for major structural defects only.

By letter of April 17, 1978 the Applicant informed the Program:

"We have recently noticed seepage of water in the basement through a crack in the basement wall.... I am wondering whether I should separately complete the claim forms or whether it could be added and inspected by your office, in the claim forms already submitted."

Mr. Truman inspected the dwelling on the above date. His examination and conclusions are set out in a Field Inspection Report. The report was not made available to the Applicant until the morning of the Tribunal hearing.

At the Tribunal hearing, Mr. Truman signified the items were not major structural defects. The Manager of Operations for the Program, a civil engineer with extensive experience in the construction business verified that the defects complained of did not come within the meaning of a Major Structural Defect as set out in the Regulations Section 1 (m).

In its decision the Tribunal accepted the professional opinion of the Manager of Programs - a professional engineer - that the defects were in fact not major structural defects within the meaning of the Regulation. The Tribunal records its understanding that the Warranty continues in respect of the dwelling for the balance of the 4-year period and includes any future situations related to the defects complained of herein, subject to reasonable homeowner's maintenance in respect thereof having been taken.

Without prejudice to any future rights that the Applicant may have under the Act and Regulations with respect to those defects complained of, the Tribunal hereby directs the Corporation not to pay out of the Corporation fund in respect of the said items.

FRANK KEHOE and MARGARET KEHOE

and

Applicants

THE CORPORATION DESIGNATED TO ADMINISTER THE
ONTARIO NEW HOME WARRANTIES PLAN

Respondent

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MATTHEW SHEARD and
LOUIS A. RICE, MEMBERS

COUNSEL: E.A. GOODMAN, Q.C., and
ROSLYN HOUSER for Applicants
BRIAN M. CAMPBELL for Respondent

DECISION: NOVEMBER 6, 1979

The Applicants had each requested a hearing before the Tribunal after being informed on behalf of the Corporation that the decision of the Corporation was to refuse the claim of each to be paid out of the guarantee fund in the amounts of \$63,375.00 and \$59,900.00 respectively.

By consent of Counsel, the Tribunal dealt with the two requests for hearing simultaneously, as the evidence presented was the same in each instance.

On the 29th of November, 1978 Frank Kehoe entered into an agreement with St. David's Investments Limited for the purchase of Suite 1208 of The Bayclub Condominium for the sum of \$63,375. The full amount was paid and deposit receipts were issued in respect thereof.

On the 29th of November, 1978 Margaret A. Kehoe entered into an agreement with St. David's Investments Limited for the purchase of Suite 108 (garden unit) of The Bayclub Condominium for the sum of \$59,900. The full amount was paid and deposit receipts were issued in respect thereof.

The agreement forms had attached as Appendix "I" Amendments to the printed form including the following clauses:

"The Vendor covenants and agrees as follows:

1. The Bayclub Condominium qualifies for and has M.U.R.B. certification by C.M.H.C.
2. The Vendor undertakes to lease and rent these premises at the expense of the Vendor to a suitable tenant. Said expenses to include all advertising, receiving of telephone calls, and processing of documents."

The Agreements had the following clauses struck out of the printed forms:

"4.05 The purchaser covenants and agrees that he will occupy the unit in person from the Occupancy Date until such time as the lending institution has advanced the full amount secured by the Unit Mortgage assumed by the Purchaser.

5.09 The Unit shall be occupied within fifteen days of the Occupancy Date and thereafter be used only for residential purposes and members of his family; any leasing or sharing with or parting with possession or assignment of this occupancy license in contravention of this provision may, at the option of the Vendor, terminate either or both the Purchaser's license to occupy the Unit or this Agreement."

In each instance the vendor failed to perform the contract. There was non-completion of the project due to financial reasons. The registration of the builder-vendor was revoked in February, 1979.

The Applicants thereupon claimed for payment out of the guarantee fund.

The Corporation's decision was based solely on a consideration of the documentation submitted as proof of claim which resolved to a consideration of the Agreements of Purchase and Sale.

The Corporation arrived at the conclusion based on amendments 1 and 2 and deletions 4.05 and 5.09 of the Agreements of Purchase and Sales, that the intent of the purchasers was to purchase for rental purposes. On the basis of its interpretation of the exclusion provisions set out in the definition of home

(O.N.H.W.P. Act 1976 Section 1 (d)) as excluding rental properties, the Corporation made the decision that the purchasers were not entitled to claim under Section 14 (1) (a) of the Act.

The position of the Corporation was that the "Agreements of Purchase and Sale speak for themselves.... they speak clearly as to the intention of the parties."

The only other information received by the Corporation was subsequent to the decision of the Corporation, in letters of July 4, 1979 requesting hearings by the Tribunal with assertions by F. Kehoe "I purchased this Condominium unit for my own use and that of my parents" and by Margaret Kehoe, "I purchased the condominium for my own use."

Frank Kehoe testified.

Frank Kehoe has been in the public service for 20 years and is now Supervisor of Technical Training in the Ministry of Transportation and Communications, at Downsview. For some time he has been living simultaneously in Orillia and in Weston, spending 4 days in Orillia and 2½ days in Toronto. He recounted his association through 10 years with the general Lake Simcoe area. He was Alderman of the City of Orillia for 3 terms, Commissioner of the P.U.C. for 2 terms, and a member of the Orillia Historical Board and of the Leacock Memorial Home Board and of the Lake Simcoe Task Force.

Because of travelling he and his wife did not have much of a home life. He determined to purchase the units at Bayclub because while contemplating the move for themselves they came to the conclusion that having his parents live in the same apartment building would be the most satisfactory solution to the problem created by the transfer of one of the brothers from Scarborough, where his parents lived, to Thunder Bay.

The original plan was for himself and his wife to go to the garden unit and for his parents to go to Suite 1208. That would mean the giving up of the apartment occupied by his parent.

He recited his actions in respect of the signing of the offers, and his concern that he was following the right procedures. Before entering into the contract he consulted with NHWP. He had his lawyer approve the general printed form of the Agreement of Purchase and Sale. During his inquiries respecting the units he learned of the M.U.R.B. designation and requested that a clause related to that be added as an amendment even though it was not fully comprehended by him, because, as

was confirmed by the real estate agent, it was a good idea. He was conscious of the fact that his father's age meant that a change in residential requirements might occur in the not too distant future. He had the clause respecting rentals added in order to give himself the maximum flexibility with respect to the future - he could either rent out Suite 1208, or move up to Suite 1208 and rent the garden apartment if that course was the most suitable, or dispose of either of the units and live in the other. He acknowledged a hope for an appreciation in the value of the unit, and that he now had an understanding of M.U.R.B.

He was firm and direct that the intention was to purchase the units for residential purposes and not for immediate rental. His concern was that the agreement be such that he could in the future do with the properties whatever he wanted. The clauses respecting occupancy, 4.05 and 5.09, were stricken out in an offer presented to him, and having read them as well as all other parts of the contract, and since they fitted his total concept, he initialled the changes.

On or about 1 February, 1979 Frank Kehoe replied to an advertisement by the Civil Service Commission in its publication Topical Job Mart for the position of Manager, Staff Development Centre, Barrie. The advertisement stated, "Preference will be given to applicants prepared to live in vicinity of staff centre". Kehoe, in his response, had said, I am definitely interested in working and living in the vicinity of the Staff Centre."

Margaret Kehoe, wife of Frank Kehoe, is a registered nurse by profession, and a teacher at Humber College. She testified that because the four-bedroom bungalow in Weston was now too big for them, and because of extensive travel by her husband and herself (since she was interested in continuing at Humber College) they had discussed plans for future living. They looked at the Bayclub development and decided it was most suitable. The garden unit was to be used by her husband and herself, and Suite 1208 was to be used by his parents. She took no part in the negotiation for the purchases and issued her cheques out of a joint fund. The Weston house was to be sold, but it was not necessary to sell it to have funds for the purchase of the 2 units.

Stella Kehoe, mother of Frank Kehoe, 80 years of age, testified. She and her husband, age 92, had resided in Scarborough for 10 years. This was most satisfactory since a son lived in Scarborough, another son lived in Whitby, and Frank lived in Weston. Recently the Scarborough son was transferred to Thunder Bay.

At first they considered following him to Thunder Bay, but the accommodation they were to go to was in the highest part of the city and there was no handy shopping. Also, the weather prospects did not appeal to them. They then considered a Senior Citizens apartment within Metro at Lawrence and Brimley, but Mr. Kehoe did not like the atmosphere. About a year ago Frank suggested that they go with him to Barrie and she and her husband were "all for it." It was close to church, her brother was in Orillia, and it was important that "in due course someone be there to look after us".

The Corporation has based its decision on its drawing from the 2 amendments and 2 deletions what it concludes is a clear intention to rent. As put forth by Counsel for the Respondent, the language has no ambiguity; the inference drawn by the corporation is one that can be made. However, the Tribunal is of the opinion that the 4 items relied upon for the inference are not inconsistent with the explanation given by Frank Kehoe. A prudent purchaser provides for as many immediate and future contingencies as can be anticipated. The actions and attitudes of Frank Kehoe are those of a very meticulous person experienced in his own particular field, and most assiduous in seeking out the proper course of action in new undertakings. It is to be noted that all other purchasers would under the circumstances of the development have been entitled to exactly the same provisions that Frank Kehoe made doubly sure of through the changes he ensured in the wording of the Agreement of Purchase and Sale. It is to be noted that in one other Agreement of Purchase and Sale there is reference to the M.U.R.B. arrangements, and in 10 other Agreements of Purchase and Sale filed, paragraphs 5.09 and 4.05 are deleted therefrom.

The Tribunal takes note of concurrent circumstances which are relevant and informative in ascertaining and determining the intent of the purchasers. There is the circumstance of the necessity for new and suitable accommodation for the parents, the association by Frank Kehoe for many years with the area in which the accommodation was purchased, the ease of commuting to Toronto and elsewhere by the Applicants from Barrie, and the clear intention of Frank Kehoe of establishing himself in the Barrie area as evidenced by his application for the Barrie Training Centre position.

The Tribunal has been favourably impressed by the straightforward testimony of Frank Kehoe, Margaret Kehoe and Stella Kehoe. The Tribunal accepts their statements without reservation.

The Tribunal finds that Frank Kehoe and Margaret Kehoe purchased the Condominium units as homes for themselves and parents in order to occupy and live in the same.

Accordingly, there is no necessity for the Tribunal to make a ruling whether dwelling units purchased for rental purposes are excluded from the provisions of the Act, as held by the Corporation, nor is it necessary for the Tribunal to make any ruling in respect of the further submission by the Solicitor for the Applicants that the Corporation was estopped by its actions from refusing to pay the claim.

The Tribunal hereby orders the Corporation to pay to the Applicants the claims made herein out of the guarantee fund. *

*Note: Program is appealing to the Divisional Court.

TIBOR KOVACS and PIROSKA KOVACS

and

Applicants

THE CORPORATION DESIGNATED TO ADMINISTER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT, 1976
RespondentTRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
JOHN C. HURLBURT, MEMBERSCOUNSEL: APPLICANTS in person
BRIAN M. CAMPBELL for Respondent

DECISION: NOVEMBER 23, 1979

The Applicants requested a hearing before the Tribunal after receipt of the Corporation's letter dated July 31, 1979 that it would not continue its efforts with respect to the matters complained of if it was the decision of the Applicants not to have such continuance.

The Applicants are making a claim under Section 14 of The Ontario New Home Warranties Plan Act, 1976, which provides in part as follows:

"(1) where

- (b) and owner has a cause of action against a vendor for damages resulting from a breach of warranty
- (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires, or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund, the amount of such damage....

- (3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection 1."

The Warranties under the program which the Tribunal finds relevant are found in Section 13 which provides in part:

- "(1) Every vendor of a home warrants to the owner,
 - (a) that the home
 - (i) is constructed in a workmanlike manner, and is free from defects in material,....
 - (b) that the home is free of major structural defects as defined by the regulations.
- (2) A Warranty under subsection 1 does not apply in respect of:
 - (c) normal wear and tear
 - (d) normal shrinkage of materials caused by drying after construction.
- (4) A Warranty under subsection 1 applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed. "

The definition of "Major Structural Defect" is set out in By-law No. R-1 of the Regulations which provides in part:

- "1. (m) "major structural defect" means, for the purposes of clause b of subsection 1 of section 13 of the Act, any defect in workmanship or materials
 - (i) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function...."

The Tribunal notes that though the Corporation sought to continue certain remedies in respect of the basement leakage, the Applicants were not agreeable to its doing so in that they had lost confidence in the Corporation. The Tribunal finds that the Corporation is entitled to act under section 14 (3) and it is to be presumed that the owner must allow this except for valid reason, and the Tribunal finds no such valid reason.

At the hearing the parties agreed that there were at issue 4 items of complaint:

1. 3 or 4 walls in basement are leaking
2. the garage floor is cracked
3. brick veneer on outside of home is chipping
4. basement walk-out is falling in.

In respect of the above, the Tribunal finds as follows:

1. The Tribunal finds that the claim respecting basement leakage comes within the program warranty, and directs the Corporation to perform or arrange for the performance of any work as will bring about a stoppage of the leakage, provided that the Applicants will accede to reasonable access for such performance.
2. The Tribunal finds that the cracks in the garage floor do not constitute a breach of warranty, that the hairline cracks are due to settling, and normal shrinkage that might result from normal construction practices. The Tribunal further finds that they do not constitute a major structural defect in that the garage floor is not load-bearing.
3. The Tribunal finds that the claim respecting the Angel-stone brick veneer spalling and cracking was not made within one year after the warranty took effect. The Tribunal finds further that the spalling and hairline cracks and chipping are a minor matter, and do not constitute a major structural defect in this case in that the brick veneer wall is not load-bearing.
4. The Tribunal finds in regard to the rear basement walk-out, that the current cracking of the coping thereof does not constitute a breach of warranty.

The Tribunal further finds that in the event there is a failure of the walk-out wall within the five-year warranty period that such failure would be considered a major structural defect, as it is considered to be load-bearing and shall be rectified by The Warranty Program in accordance with the Act. *

*Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

345508 ONTARIO LIMITED
carrying on business as
LENTHALL HOMES

Applicant

and

REGISTRAR, ONTARIO NEW HOME WARRANTIES PLAN ACT
Respondent

TRIBUNAL: J. YAREMKO, Q.C., CHAIRMAN
IRWIN CASS, Q.C., and
STEPHEN PUSTIL, C.A., MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent
S. SUGARMAN - Agent

DECISION AUGUST 9, 1979

The Applicant had requested a hearing after receiving a notice of proposal dated June 8, 1979 from the Registrar under section 9 of the Act proposing to revoke its registration under the Plan for the reasons stated on the back thereof.

Upon consent of the parties the Tribunal ordered that:

The Proposal of the Registrar be upheld unless within 21 days from the date hereof, August 9, 1979, 345508 Ontario Limited, carrying on business as Lenthall Homes, pays to the order of The Ontario New Home Warranty Program the sum of \$1,445.00.

MALBAR CONSTRUCTION LTD.

and

Applicant

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT

Respondent

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN
ACTING AS CHAIRMAN
HELEN J. MORNINGSTAR and
JOHN C. HURLBURT, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

DECISION: SEPTEMBER 26, 1979

As neither a representative of the Applicant nor its Counsel appeared, the Tribunal delayed the hearing for three and a half hours (from 9:30 a.m. to 1:00 p.m.) and then proceeded to hear the matter after evidence was given of proper service of the Notice of Hearing.

The Applicant had requested a hearing after receiving Notice of a Proposal dated July 5, 1979 under section 9 of the Act from the Respondent refusing to renew its registration under the Plan for the following reasons:

" Having regard to your financial position you cannot reasonably be expected to be financially responsible in the conduct of your undertakings as required by paragraph 7 (1) (a) or subparagraph 7(1) (c)(i) of the Act, more particularly as follows:

Cheque for renewal fee returned by bank "Not Sufficient Funds".

You have a record of breaches of warranties within the meaning of sub-section 8 (2) of the Act.

Failure to diligently perform or cause to be performed all obligations imposed on you under the Plan under any agreement made by you with the Corporation in respect of the Plan.

"Failure to indemnify and save harmless the Corporation and the insurer for the time being under any contract or contracts of insurance establishing the guarantee fund from any loss which they or any of them may suffer by reason of your failure to diligently perform or cause to be performed all obligations imposed on you under the Plan and under any agreement made by you with the Corporation in respect of the Plan.

Failure, without undue delay, to complete the construction of every home commenced by you in accordance with the Act."

The Regional Manager for Ottawa of the HUDAC New Home Warranty Program, testified that he had received from the owner of a home enrolled as number 9868, a copy of the latter's letter to the Applicant dated August 15, 1978 complaining of outstanding work to be done on his house and subsequently directed several letters requesting correction of the outstanding complaints to which he received no response. The HUDAC New Home Warranty Program then obtained an estimate and contracted for the work to be done in the amount of \$1,310 and \$515 for a total of \$1,825.00.

On May 11, 1979 a revocation letter was sent to the Applicant by the Respondent.

On May 23rd a representative of the Applicant company delivered to the Respondent at the Ottawa office an Application for renewal of Registration together with the Applicant's cheque in the sum of \$1,360 to cover the outstanding claim of \$1,310 together with \$50 on account of Renewal of Registration fee. This cheque, dated May 23rd and drawn on the Royal Bank of Canada was subsequently returned marked N.S.F.

Between the time the cheque was delivered to the Respondent in Ottawa and the cheque was returned dishonoured by the bank, a letter dated May 29, 1979 was sent to the Applicant purporting to rescind the revocation letter of May 11th.

On August 1st, some three weeks subsequent to the delivery of the Respondent's Notice of Proposal, the sum of \$50 was received but on that date the Respondent wrote the Applicant saying that while the receipt sum of \$50 was noted, until the sum of \$1,310 was received to replace the balance of the amount of the dishonoured cheque, the Registrar's Proposal to revoke the Applicant's registration still stood.

At the time of the hearing the aforementioned amount of \$1,310 outstanding on the N.S.F. cheque was still owing to the Respondent (as well as the balance of the contract price, paid by the Respondent on July 27th, in the amount of \$515) although demand had been duly made.

The Applicant, having requested this hearing, failed to appear. In the opinion of the Tribunal, the Applicant is clearly in breach of its obligations to indemnify and save harmless the HUDAC New Home Warranty Program for and from its outlay and loss as set out in the evidence referred to above and in accordance with the terms of registration agreed to by it. The Tribunal is satisfied that the conditions of registration set out in section 8 (2) of the Act have been breached. Having regard to the matter of the N.S.F. cheque referred to in evidence and to the failure of the Applicant to settle its outstanding indebtedness to the Respondent, the Tribunal cannot reasonably expect the Applicant to be financially responsible in the conduct of its undertakings as required by paragraph 7 (1) (a) or sub-paragraph 7 (1) (c) (i) of the Act.

The Tribunal notes that the sum of \$50 to cover the Applicant's renewal fee, originally included in the N.S.F. cheque referred to, was eventually paid. The Tribunal also notes that the complaints before it are in respect of one new home only. Notwithstanding this, however, the Tribunal considers the Respondent's proposal to be well-founded.

ORDERED: The Registrar by this Order is directed to carry out his Proposal to refuse to renew the registration of the Applicant.

MORNINGSIDE MANAGEMENT COMPANY

223

Applicant

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
STEPHEN PUSTIL, MEMBERS

COUNSEL: C.von BUCHWALD for Applicant
BRIAN M. CAMPBELL for Respondent

DECISION: FEBRUARY 28, 1979

The Applicant had requested a hearing after receiving a Notice of Proposal refusing to renew its registration. The reason cited was a record of breach of warranties within the meaning of sub-section 8 (2) of the Act: (a) failure to diligently perform or cause to be performed all obligations imposed on you under the Plan under any agreement made by you with the Corporation in respect of a plan; (b) failure to indemnify and save harmless the Corporation from losses through payment of claims upon the guarantee fund arising through defaults in completing or effecting repairs to homes undertaken by you to build; (c) failure without undue delay to complete the construction of every home commenced by you in accordance with the Act; more particularly, failure to respond to a conciliation decision on a home situated in Scarborough.

The house was partially built in 1976-77 when the original builder became insolvent. The Applicant was not a builder and took over the property in an uncompleted state by way of power of a sale under its mortgage, and enrolled in the plan June 8, 1978. The Applicant hired a contractor to effect the repairs required.

In October of 1977 the purchaser wrote to the Applicant with copy to Hudac setting forth various complaints. There was no indication they had been attended to and in February 1978 the owners requested a conciliation. A letter enclosing the request was forwarded to the Applicant and requested representation within fourteen days respecting the complaints.

On March 29, 1978 the Applicant's lawyer advised he had been informed by his contractor that everything had been completed except the screen cap on the chimney which will be done when the weather permits; discussions were taking place with the Borough of Scarborough with respect to the basement walls. The Scarborough Building Inspector recommended removal of bricks and installation of flashing.

The Applicant through his lawyer disagreed with this recommendation and indicated in his opinion the weeper holes could be filled and a silicone applied to the inside walls of the basement.

This was not satisfactory to the owner; an inspection was made by Hudac on April 3, 1978 and the conciliation decision forwarded to the Applicant and owner on April 12, 1978. Hudac's technical representative could not agree to repairing basement leaks by silicone material; the Building Code does not specify as to the silicone coat and there is no proof as to how good it is or how long it will last.

On October 16, 1978 Hudac gave the Applicant an October 26, 1978 deadline to complete the outstanding work. No reply was received from the Applicant and the final inspection was made in late November or mid December, 1978.

Quotations were obtained and contracted for in the amount of \$780.45. The only outstanding repair is the correction of leaking of water into the basement and this cannot be done until Spring.

The Tribunal makes the following findings on the evidence:

1. The Applicant had a number of breaches of warranties as set forth above;
2. The Applicant has failed to correct deficiencies;
3. The Applicant has failed to perform its obligations under its agreement with the Hudac Corporation;
4. The Applicant has failed to complete the construction of the Scarborough property without undue delay; and
5. the Hudac Corporation had no other alternative but to repair and complete the deficiencies.

The Tribunal, because there were no other houses involved in the complaints save 59 Galloway Road, Orders and Directs the Respondent to refrain from carrying out his proposal to refuse

to renew the Applicant's registration, which renewal shall be granted by the Respondent on the following terms and conditions that:

1. The Applicant shall pay all sums of money expended by the Hudac Corporation in reference to 59 Galloway Road, Scarborough, and
2. The Applicant shall effect the necessary repairs to make the basement walls of said premises weather and water proof in accordance with the Ontario Building Code, not later than June 1, 1979.

PATRICIA and GORDON MacCOLLUM

and

Applicants

THE CORPORATION DESIGNATED TO ADMINISTER THE
ONTARIO NEW HOME WARRANTIES PLAN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
IRWIN CASS, Q.C., and
JOHN C. HURLBURT, P.Eng.
MEMBERS

COUNSEL: J. KELLER for Applicants
BRIAN M. CAMPBELL for Respondent

DECISION: FEBRUARY 27, 1979

Applicants required a hearing into the Registrar's refusal to refund deposit of \$2,455.59.

But Applicants had been in possession for seven months and occupancy rent of \$2,464 (being \$352.00 monthly) had not been paid. Registrar had refused the refund on grounds that no financial loss had been suffered irrespective of the contractual considerations (e.g.-any claim for damages for non-performance).

The Tribunal gave its decision orally as follows:

The Tribunal upholds the decision of the Corporation and denies the claim for the following reasons:

The Regulations, section 6 (1) (i) sets forth the limits of liability to the amount equal to all deposits and section 14, sub-section 2 of the Act states that, in assessing damages, the Corporation shall take into consideration any benefit to the person.

The benefit received by the Applicants by way of occupancy rent is more than the deposit, and there can be no recovery from the Corporation.

Even if the sum of \$435.00 out-of-pocket expense as damages had been allowed despite no proof of same, the decision would remain unaltered as the limit of liability confines the Tribunal to the amount equal to all deposits.

ROSS McDONAGH and JOSEPH PALMERIO

Applicants

and

THE CORPORATION DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: J. C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS, C.A. and
LOUIS A. RICE, MEMBERS

COUNSEL: ARNELL GOLDBERG, Q.C. for Applicants
BRIAN M. CAMPBELL for Respondent

DECISION: APRIL 27, 1979

The Applicants had requested a hearing before the Tribunal after being informed by the HUDAC New Home Warranty Program that their claims for return of deposits which they allegedly had paid by way of deposits for two condominiums in the City of Ottawa had been refused.

The notice of decision dated January 29, 1979 states:

"We refer to our previous telephone conversations and correspondence concerning the above, in respect of claims for return of deposits made towards the purchase of suites in the Crosswinds Condominium in Ottawa. In particular, we make reference to your letter of January 19, 1979 and to our telephone conversation of January 26th.

Your letter of January 19, 1979 revealed for the first time the true nature of the manner in which the parties above acquired an interest in Suites 1706 and 1707. As expressed to you in our telephone conversation, the HUDAC New Home Warranty Program does not consider that a valid claim exists in the circumstances, as no deposit was made. Any financial loss which may have been incurred by Leader Structures (Ontario) Ltd., or by the parties named above, was a result of contractual dealings with Marvo Construction Company which

were in no way specifically related to the two units in respect of which you are claiming refund of deposits. The HUDAC New Home Warranty Program is not liable for an accounts receivable matter between builder and contractor.

We conclude that the claims submitted by yourself and Mr. Palmerio are therefore not covered by the HUDAC New Home Warranty Program."

The Manager of Finance of the Program and Supervisor of Claims, testified. The Program had agreed to refund deposits to 51 of the 58 purchasers of condominiums in the project. He had written to every purchaser of same on July 14, 1978 sending them the required documents and requesting information and documentation from each of the purchasers.

He received a copy of the Joe Palmerio In Trust Agreement of Purchase and Sale unsigned by the purchaser. The Agreement shows a purchase price for the "Apartment 1707" of \$40,700 with a deposit of \$500 received by the Vendor with the balance of \$40,200 to be paid on closing on January 3, 1978, together with an undated copy of the Ross McDonagh In Trust Agreement of Purchase and Sale. This Agreement shows a purchase price of \$46,300 with a deposit of \$500 received by the Vendor with the balance of \$45,800 to be paid on closing on January 3, 1978 for "Apartment 1706."

On August 17, 1978 Joe Palmerio and the Vendor's authorized officer signed a termination and rental agreement and demanded return of his deposit. On the same day a similar document was executed by Ross McDonagh and the Vendor's authorized officer.

The witness stated he had written letters to the Applicants requesting documentation and verification of each claim to which no reply was received until a telephone call was received in November, 1978 giving a new address.

The witness then wrote similar letters dated November 15, 1978 to both Applicants in which he enclosed documents required to commence the necessary procedures prior to making repayments of their deposits and indicated that evidence would be required in the form of cancelled cheques or signed sworn documents to the effect that the deposits actually were paid and a copy of the original Agreement of Purchase and Sale between Applicant and Vendor.

The witness produced a letter from the legal firm dated December 18, 1978 addressed to HUDAC enclosing all documents required of McDonagh except proof of payment of the deposit. A similar letter and documents were received by HUDAC concerning Palmerio.

The witness said that Proof of Claim, Part D, relating specifically to deposits, was not returned in either case. Instead, a letter from Marvo Construction Co. Limited dated November 24, 1978, was addressed to the witness stating re Palmerio:

"This is to confirm that Unit 1707 was purchased by Mr. Joe Palmerio in trust on December 7, 1977. The total amount paid and owing to this purchaser is \$40,700. (Forty Thousand and Seven Hundred Dollars).

A copy of the Purchase and Sale Agreement is attached."

A similar letter dated November 24, 1978 concerning Unit 1706 purchased by McDonagh showed the amount paid and owing as \$46,300.

The witness drew to the attention of the Tribunal the paragraph in the solicitor's letter, that states:

"Would you please note that in lieu of the cancelled cheques or the statutory declaration, we have provided you with the letter of acknowledgement from the selling company."

On January 12, 1979 a letter was directed to the builder with respect to Applicants' claims and there was no response to this letter.

On January 19, 1979 the witness received a letter on the stationery of Leader Structures (Ontario) Limited signed on its behalf by McDonagh enclosing a copy of accounts receivable card for Marvo Construction indicating outstanding balance of \$86,452.40 going back to early 1977, and stated they were owed the above plus interest which was contrad by the two units mentioned above. The Companies' interest in above two units was transferred to Mr. Palmerio and Mr. McDonagh.

The photostatic copy of the enclosed copy of accounts receivable card referred to in said letter shows various debts and credits and balances from March 1974 to February 2, 1977.

The witness said that this evidence provided by the Applicants clearly showed that the Marvo Construction account was contrad in November 1978 whereas the Agreements and the "deposits" in question were dated in December 1977. The prior entry there-to was April 7, 1977. There was no evidence of any actual payment or deposit being made by the Applicants; he wrote to the Applicants denying their claims.

The witness stated that Agreement of Purchase and Sale were valid contracts and had the Applicants issued cheques to Crosswinds in payment, refunds would have been issued immediately.

No evidence was tendered on behalf of the Applicants.

Counsel for Applicants argued that in April 1977 prior to the Agreements in December 1977 to purchase the units there was owing to the Applicants \$86,452.40 and the bookkeeping was only brought up-to-date in November 1978. He maintained that the Applicants had paid for their contracted units and had gone into possession on December 15, 1977.

Counsel argued that the Applicants' claim fell within Section 14 (1)(a) of the Act and stated that the financial loss suffered by the Applicants was in the amount equal to all money owing by the vendor to the purchaser and contended that section 14 (1) referred not to a deposit per se but to a monetary amount.

Under section 23 of the Act, the Corporation cannot make by-laws setting up new conditions for modes of payment for damages by purporting to say that claims for damages are equated to deposits. Section 14 (1) of the Act refers to a monetary amount and not to a deposit.

In the case at hand there was a supply of materials (which was in a monetary amount) to the vendor. He admitted that the materials were not supplied to the building in question.

He quoted the case of The Queen v. Bermuda (?) (B.C.App) 9 D.L.R. (3rd) 595 at 599 to the effect that Regulations cannot exceed the powers granted under the Statute and submitted that therefore the contention of the Respondent that "deposit" means money is not valid and even if a money definition in Regulation 1 (j) is accepted, it must be given a broader definition than

coin of the realm. Perrin v. Munja 1943, 1 A.E.R. 187 - Lord Simon said money was equivalent to debts owing. Counsel noted that witness said he would have accepted a cheque to prove a deposit and a cheque is not money or coin of the realm.

As for the argument that the "payments" were made by the third party by way of a contra account, he said it was trite law that Party A can enter into a contract with Party B for B to pay C what A owes to C.

Counsel said that Leader Structures was a forming contractor and the amount claimed was owing to it by Marvo Construction as of the date of the Agreements and Counsel for Respondent agreed with that statement.

Counsel for the Respondent argued that section 14 (1) (a) of the Act relates to the claim of a financial loss to the person who has entered into the contract. The claim was for return of the deposits.

As for the trite example, nothing was paid by Leader Construction to Marvo, nor was it proven that Leader Construction owed any money to the Applicants or that the Applicants held the condominiums in trust for Leader Construction or anyone else for that matter. He contended that the debt by Marvo to Leader Construction was in existence prior to the date of the contracts. This debt could not be equated to a deposit as it was a contra account. He noted the contra account being credited in November 1978, eleven months after the contracts were entered into, and submitted that a prior debt between two corporations cannot be equated to a financial loss of two private individuals, nor is it the subject matter of a deposit; a prior debt cannot be set off as a deposit.

There is no loss to Leader Construction as the money set off is still owing to it either by Marvo and its partners or by the Applicants as it received no consideration for the set-off.

Counsel for Respondent proceeded to give three definitions of the word "deposit" and how they related to the case at hand:

- (a) "all money received" - here no money was received from the purchasers;
- (b) "money received on account of purchase price" - here the debt did not arise on account of the purchase price. It arose between two other entities and was in existence prior to purchase; and

(c) "money payable under a purchase agreement" - here the money payable arose out of work and materials not under the purchase agreements. It arose independently of the agreements."

and submitted therefore that none of the tests applied and therefore no deposits were paid or received.

Counsel for the Respondent submitted that the Applicant did not contemplate paying deposits and that Counsel for Applicants was trying to change a debt owing to Leader Construction by Marvo to a deposit by two entities, the Applicants. The Respondent is not a guarantor of the debts of others, and stated that even if Leader Construction had been the purchaser under the same circumstance, it would not have been entitled to such a claim.

As for Counsel for Applicants statutory interpretation of the Act, the words in the Regulation must be given their reasonable meaning. Words are to be correctly used and not interpreted loosely (Craies 1963 6th Edition on Statutory Law, p.159). Maxwell on Interpretation of Statutes, 11th Edition at p.12 - "Words have their plain meaning".

He contended that there is no ambiguity in the definition of the word "deposits". One has to look as well to the purpose of the Act which was not to protect sub-contractors out of the Guarantee Fund.

As the Applicants made no deposits Counsel for the Respondent contended the Fund should not have to pay prior debts.

The Tribunal makes the following finds on the evidence:

- 1) There was no proof offered that Leader Construction owed any money to the Applicants;
- 2) No moneys were paid by the Applicants to Marvo by way of deposit or otherwise;
- 3) Exhibit 10A states that "The Companies interest in above two units was transferred to Mr. Palmerio and Mr. McDonagh". The Tribunal finds no such proof of such a transfer;
- 4) The contrad account eleven months after the Agreements were signed is not a deposit by the Applicants under the Act, its Regulations or by definition; and

5) The Applicants suffered no financial loss.

The Tribunal therefore agrees with the decision of the Respondent.

ORDERED: Corporation not to pay the claims of the Applicants.*

* Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

LUIGI PASTORE

Applicant

and

THE CORPORATION DESIGNATED TO ADMINISTER
THE ONTARIO NEW HOME WARRANTIES PLAN

Respondent

TRIBUNAL: JOHN YAREMKO, Q.C.
WATSON W. EVANS, C.A.
LOU RICE, MEMBERSCOUNSEL: BRIAN M. CAMPBELL for Respondent
JOSEPH BREGLIA for Applicant

DECISION: JULY 30, 1979

The Applicant had requested a hearing on the decision of the Corporation to refuse his claim to be paid out of the guarantee fund in the amount of \$20,000 by reason of a Builder's failure to perform a contract.

Applicant entered into a written agreement on or about the 26th day of April, 1978 with Builder for the purchase of a dwelling to be completed at 47 Virginia Avenue for the sum of \$113,500. The sum of \$5,000 was paid as a deposit, the sale was to be completed on or about the 1st day of September, 1978.

Having sold the dwelling wherein he was living at the time of purchase, and having moved into rented accommodation of which possession was sought by the lessor, the Applicant was persuaded by the Builder to make an advance of a further \$40,000 which Applicant was led to believe was necessary for the continuing construction of the dwelling and its completion by September 1, 1978. At this time Builder had under construction a number of homes and was experiencing (unknown to Applicant) financial difficulties with respect to their completion.

Builder purposely gave the Applicant security with a bonus of \$2,000 for making the advance by way of mortgages on two other properties. The two properties were at the time considerably encumbered by previous mortgages; this was not a matter of discussion or disclosure, nor were the properties inspected to determine the worth of security given.

As of the 29th of June, the Builder signed separate acknowledgements of the sum of \$20,000 as additional deposits pursuant to the Agreement. The acknowledgements had not been produced in support of Applicant's claim but were produced for the first time at the Tribunal hearing.

On September 13th by mutual agreement of the parties the closing date was extended to the 25th of October, 1978.

In September, Builder executed a Mortgage to the Applicant and his spouse on the property being purchased, 47 Virginia, in the sum of \$ 2,000, and at the same time the mortgage on one of its other properties was discharged. Ultimately the mortgage on 47 Virginia became the 3rd.

On or about the 5th day of October, 1978 it appeared that the Builder was going to have difficulties with respect to the homes he had under construction. Because there was insufficient construction at the two properties mortgaged to provide security, at the instigation of Applicant's solicitor, there was registered a mortgage from Builder's wife to Applicant and of his spouse in the sum of \$30,000 together with interest at 10% to become due and payable on the 25th of October, 1978 on the residence of the Builder and his wife. There were already three mortgages on that property with face amounts totalling \$114,000. The solicitor for Builder wrote to the solicitor for Applicant and acknowledged that this mortgage was given as collateral security for all other monies advanced by the Applicant and his spouse to Builder and without any prejudice to their rights to pursue other remedies under HUDAC and that all of these monies were in part payments for the house being purchased by Applicant and his spouse.

On or about the 23rd of October, 1978 construction ceased and it was evident that Builder would not complete the construction and therefore the sale would not be completed in accordance with the agreement of April, 1978.

Prior mortgagees of the properties initiated proceedings under power of sale.

On or about the 29th day of December, 1978 Applicant entered into an agreement to purchase 47 Virginia Avenue from a second mortgagee taking action at the price of \$86,500. The purchase was completed and Applicant became an owner of 47 Virginia Avenue.

The Applicant's interest in 141 Virginia Avenue and 98 Newlands Avenue were eliminated by virtue of the power of sale proceedings taken in respect thereof. Some \$30,000 was expended to complete the dwelling in accordance with the provisions of the agreement of April, 1978. The accounting with respect to the claim of Applicant was as follows:

Deposits to Builder	\$45,000.00
Balance due on closing on purchase from second mortgagee	43,249.30
First mortgage assumed	43,250.05
Estimated cost to finish house	30,000.00
<hr/>	
Total:	\$161,499.35
 Less accounting to Applicant as third mortgagee	20,698.63
Net final cost	<u>\$141,800.72</u>
April purchase price	113,500.00
Estimated loss to Applicant	28,300.72

Citing a decision of the Tribunal in *Re Stathakis* issued 5 June, 1979 and not yet published, Counsel for the Program submitted firstly as a ground for a refusal of the claim that the Applicant had become an owner and accordingly was not, under Regulation 6 subsection (1) entitled to be paid out of the guarantee fund. This reason had not been given prior to the Tribunal hearing.

In *Re Stathakis*, apart from the nature of payments and related matters, the circumstances were quite similar - the original purchaser upon default of the vendor became the owner, having bought through the exercise of a power of sale by a mortgagee. *

The Tribunal referred to the *Stathakis* decision and was of the opinion that the instant case was on all fours with that and agreed with the submission.

At the Tribunal hearing the Counsel for the Program also submitted secondly, that if the \$45,000 were to be held to be deposits, the refusal was proper since there should be taken into consideration in the assessment of damages under Section 14 (2) the benefits which had been given Applicant by virtue of the mortgages in the aggregate of \$72,000. This reason had not been given prior to the Tribunal hearing.

*See reference re *Stathakis* in this issue.

The Tribunal is of the opinion that Section 14 (2) is not applicable where a purchaser has received collateral security to the performance of the contract, and no realizable benefit had in reality accrued. The \$20,698.63 realized under the mortgage on 47 Virginia was properly credited in the accounting to determine the loss suffered. The other two mortgages were not given in settlement of the default by the builder, nor was any benefit realized therefrom. The Tribunal finds that the mortgages on properties other than the one being purchased were not a benefit, compensation, or indemnity to the Applicant. A distinction was drawn between the giving of the mortgages herein and the giving of the promissory note, as in *Re Stathakis*

There was reiterated by Counsel for the Program before the Tribunal as a third reason for a refusal of the claim, the position of the Program that the \$40,000 paid -

"....were made by way of security on other properties and did not form part and parcel of the said Agreement of Purchase and Sale, and further, it is not the subject matter of a deposit claim under the definition of a deposit as set forth in the Regulations"

The Tribunal does not agree with that position.

There is nothing to indicate that the transactions were mortgage transactions, apart from the nature of the documents signed and the notations on the cheques with respect thereto. The Tribunal, having heard the testimony of the Applicant and the Solicitor involved, and in the light of the acknowledgements produced before it is of the opinion that it is clear that the mortgages were executed for the sole purpose of giving security to the Applicant with respect to the completion of the dwelling at 47 Virginia Avenue. The Tribunal finds that the 2 cheques totalling \$40,000 were in fact further advances by way of deposits under the agreement of April, 1978 and constitute together with the cheque for \$5,000, deposits within the meaning of Regulation 1 (j).

The Tribunal led that the Applicant is not " a purchaser who does not become an owner", and accordingly was not entitled to be paid out of the guarantee fund by virtue of Regulation 6 (1). The Tribunal directed the Corporation not to pay the claim of the Applicant.

MR AND MRS MICHAEL SCIME

and

Applicants

THE CORPORATION DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN

Respondent

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN, ACTING
AS CHAIRMAN
HELEN J. MORNINGSTAR and
LOUIS A. RICE, MEMBERSCOUNSEL: BRIAN M. CAMPBELL for Respondent
APPLICANTS in person

DECISION: NOVEMBER 22, 1979

Two years after taking possession of premises warranted under the Act the Applicants complained to the Respondent of hairline cracks around the basement windows. A warranty under section 13 (a) (viz, that a home is constructed in a workmanlike manner, in accordance with the Ontario Building Code, free from defects in material and fit for habitation) applies only in respect of claims made within one year. Section 14(1) (c) extends the period of beneficial entitlement for a further four years or longer where an owner suffers damage because of a "major structural defect".

The Tribunal found upon the evidence that the cracks complained of in this case were normal developments and should be attended to by the owners by way of normal maintenance and upheld the Respondent's decision to refuse to repair or otherwise indemnify the Applicants. They were not "major structural defects". Such problems fell outside the scope of the Respondent's responsibility under the Warranty Program. The Tribunal's decision was given orally as follows:

The decision of the Warranty Program will be upheld and the Tribunal concurs with the reasons for that decision, namely that the cracks or defects complained of in this case are not major structural defects within the meaning of section 13 of the Act and Regulation By-law R-1, section 1 (m).

STEVE STATHAKIS
and
Applicant

THE CORPORATION DESIGNATED TO ADMINISTER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT
Respondent

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
STEPHEN PUSTIL, C.A., MEMBERS

COUNSEL: CLINT H. CULIC for Applicant
BRIAN M. CAMPBELL for Respondent

DECISION: JUNE 5, 1979

The Applicant had requested a hearing on the decision of the Corporation;

"the evidence with respect to a claim of Mr. Stathakis as against the Warranty Program has not been made out by Mr. Stathakis... The Program is not prepared at this time and as indicated to you in previous correspondence to entertain the claim as presented. "

The Corporation had earlier requested "a copy of both Agreement of Purchase, cancelled cheques, and any correspondence indicating that attempts have been made to secure the deposit monies from the original builder-vendor."

In October, 1976, the Applicant entered into an oral agreement to purchase from Cosenza Homes 51 Larwood Blvd. for the sum of \$135,000. The Applicant claimed to have made during the construction the following payments as deposits to the builder:

March 3, 1977	\$25,000.00
November, 1977	5,000.00
January, 1978	8,000.00
February, 1978	4,000.00
March, 1978	3,500.00

The evidence of payments consisted of two receipts and endorsements thereon. One of the items was a receipt dated March 31, 1977 for \$25,000 made out to Applicant signed by one, Jose Sara, the principal for the builder, Cosenza Homes. The receipt was typed out and had the following notation:

" For new House - 51 Larwood Blvd. Scarborough

Full amount:	\$140,000
Less:	25,000
Balance:	<u>115,000</u>
	"

On June 1st, 1978 a written Agreement of Purchase and Sale was executed with Applicant as purchaser and Cosenza Homes Ltd. as vendor. No monies were paid thereunder.

Before the transaction was completed the existing mortgagees, five of them, proceeded with sales proceedings and they were about to sell the property. The Applicant, because he had already moved into the premises, agreed to purchase from the said mortgagees, the property for the sum of \$135,000. The transaction was completed. At that time the Applicant received from the principal, Sara, a promissory note for \$20,000.

The Applicant was determined to acquire the home. He was very forceful in his position that he wanted the house even though it would likely cost him more than he had originally agreed. At this time, Cosenza Homes Ltd. was prepared to give the Applicant a promissory note for the sum of \$40,000, and it appeared that Cosenza Homes Ltd. would be going into bankruptcy.

The Tribunal stated:

" On behalf of the Applicant it was submitted that \$40,500 had been paid as deposits through Joe Sara under an oral purchase agreement with Cosenza Homes Ltd. which had failed to perform the contract, that he, the Applicant, had received a promissory note for \$20,000 and that accordingly his financial loss was \$20,500 so that he was entitled under Section 14 (1) of the Act to the limit of \$20,000 set out in Regulation 6, subsection (1).

On behalf of the Program it was submitted that:

- "1. There was no purchase agreement as required by By-law 1 Section (6) subsection (1). An oral agreement was not construed as the agreement required.
2. The Statute of Frauds was a bar to any action in respect of any oral agreement and accordingly in respect of any monies alleged to have been paid.
3. Joe Sara and Cosenza Homes Ltd. were two separate entities.

4. There was no sufficient evidence by way of documentation that the payments alleged to have been paid were in fact paid. The receipts filed were not to be construed as proper documents to prove that payments were actually made by cash or otherwise. No substantial proof was supplied that payments were part and parcel of an agreement of sale and therefore the payments were not deposits pursuant to an agreement.

5. The only relevant purchase agreement in existence was that of June 1st and in fact no monies were paid thereunder, for any payments would have been made prior to the written agreement so that there were no deposits owing by Cosenza Homes Ltd. under that purchase agreement. The Program required cancelled cheques with direct reference to the purchase agreement of the 1st of June.

6. The payments appeared to be in respect of some contra account and the promissory note given substantiated that position.

7. The Applicant had become an owner and accordingly was not, under Regulation 6 subsection (1) entitled to be paid out of the guarantee fund.

The Tribunal is of the opinion that there is no requirement under the Statute or Regulation that the agreement be a written one in the conventional form. Section 14 Subsection (1) of the Act refers to:

"where,

(a) a person who has entered into a contract with a vendor for the provision of a home...."

there is no reference to the contract being in writing. Under the Regulations Section 1 (i) the definition of a deposit receipt is that of a receipt "in respect of the purchase agreement". There is no reference to the purchase agreement being in writing. The definition of a purchase agreement in Section 1 subsection (o) is that of "an agreement between the vendor and any person...." There is no reference to the agreement being in writing. The definition of a purchaser in Section 1 Subsection (q) is that of "a person who enters into a purchase agreement with a vendor"; there is no reference to the agreement being in writing. The only provision where writing is

is alluded to is in Regulation 2 (a) in respect of the delivery of documents where it is stated, "at the time of execution by the vendor and purchaser of a purchase agreement, the vendor shall deliver to the purchaser a deposit receipt." The Tribunal does not infer from this latter single provision, and in the light of the other provisions that a written purchase agreement is a condition precedent to a claim on the guarantee fund. The Tribunal finds that there was in October, 1976, an oral agreement of purchase and sale for 51 Larwood Blvd. between Applicant and Cosenza Homes Ltd.

The oral agreement was a contract which was enforceable against Cosenza Homes Ltd. The receipt dated 31st March, 1977 was a sufficient memorandum. The receipt would:

" be sufficient to satisfy the requirements of The Statute of Frauds, R.S.O. 1937, c.146 as it contained the three ingredients mentioned in *McKenzie v. Walsh* 61 S.C.R. 312, 57 D.L.R. 24 (1921) W.W.R. 1017, which had decided that (D.L.R. headnote) 'The essential terms of an oral contract for the sale and purchase of real property are the parties, the property and the price, and if the written memorandum or receipt contains these essentials it is sufficient to satisfy the Statute of Frauds, although arrangements subsequently made for a time of completion and possession which are in the nature of appointments merely to carry out the contract and not varying its terms are not included in the memorandum.'"

Rowe et al v. Fidelity-Phenix Fire Insurance Co. 1940 OWN 388 at 389.

The receipt is clearly a document relating to a purchase and sale. Though the memorandum (receipt) does not disclose the name of the real vendor, the principal (Cosenza Homes Ltd.) it does disclose the name of the agent (Joe Sara) who had authority to bind the vendor. (*Maybury v. O'Brien* 1911 250 O.L.R. 229 at 233). And see *Dart V. & P.* 217, 8th ed.

Although one of the parties appears from the memorandum to be a principal, parol evidence would be admissible to prove who is the principal. *Dart V. & P.* 215, 8th ed. The issue was reviewed in *M'Clung v. M'Cracken* 1883 O.R. 596 at 601.

" The proposition is, A, duly authorized to sell C's house, contracts with D. to sell it as if it was his own, as thus, I agree to sell to you the house No. 1 Portland Place for so much; that C the true owner, cannot be sued on this contract. I hardly think the law is so.

This contract does contain the name both of a vendor and a purchaser, and so *prima facie* complies with the rule. I think the undisclosed principal can be proceeded against on this contract, on proof of the agency in A.

The rule seems very clearly laid down in Higgins v. Senior, SM & W. in 844, in the well considered judgment of Parke, B:
"There is no doubt that where such an agreement is made it is competent to shew that one or both of the contracting parties were agents for other persons, and acted, as such agents in making the contract, so as to give the benefit of the contract on the one hand to, and charge with liability on the other, the unnamed principals, and this whether the agreement be or be not required to be in writing by the Statute of Frauds, and this evidence in no way contradicts the written agreement. It does not deny that it was binding on those whom, on the fact of it, it purports to bind, but shews that it also binds another, by reason that the act of the agent in signing the agreement in pursuance of his authority is, in law, the act of the principal."

The receipt was signed by the controlling shareholder who was authorized to act on behalf of the owner builder, Cosenza Homes Ltd; and the company could not have maintained that Joe Sara was acting on his own behalf. It is noted that both Cosenza Homes Ltd. and the home were registered under the Act whereas Joe Sara was not.

The Tribunal finds that payment of \$40,000 as alleged by the Applicant, was made to Cosenza Homes Ltd. through Joe Sara and the Tribunal is of the opinion that the same constitute deposits within the meaning of Section 1 (j) of the

Regulations being "in respect of a home....monies received before the date of possession by or on behalf of the Vendor from a purchaser on account of the purchase price payable on a purchase agreement." There was no indication that the payments were made in respect of any other matter.

The Tribunal finds that the agreement of June 1st was an attempt at formalizing the oral agreement, and that the deposit referred to therein was not paid at the time thereof.

The Tribunal is of the opinion that having 'become an owner' of the home, the Applicant (purchaser) herein is not entitled to be paid out of the guarantee fund under the limitation of Regulation 6 (1).

It was submitted on behalf of the Applicant that since the Applicant had not become an owner through the purchase agreement with Cosenza Homes Ltd. but through a separate agreement with a mortgagee, the restriction of Regulation 6 (1) is not applicable. The Tribunal does not agree with that submission.

When the vendor failed to perform the contract, the Applicant had a choice from 2 alternatives - to resort to the guarantee fund or to proceed to become an owner. He chose the latter course. He knew what it would cost him to become an owner and he was prepared to pay what was necessary; indeed, he was determined at all costs to become the owner. His decision to complete a purchase and at a cost determined by the existence of mortgages was influenced by the fact that he believed he would have recourse to the fund and that coupled with the promissory note would make the final price equivalent to the original price. The Applicant should not expect the fund to make up for any difference in value if he did not believe that the property was worth the ultimate price. The Tribunal is of the opinion that he ought to have resorted to Joe Sara for a commitment by way of promissory note or otherwise in respect of the additional monies paid if he believed his trust had been personally betrayed him. He turned down the opportunity of receiving from the vendor under the contract (Cosenza Homes Ltd.) a promissory note for \$40,000 for the full amount of his payments. It was not the intent of the Act that the fund be made available where there was such recourse.

Reference was made by the solicitor for the Applicant to the Interpretation Act R.S.O. 1970, Chapter 225 Section 10.

"10. Every Act shall be deemed to be remedial whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of any thing that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning, and spirit"

R.S.O. 1960, c. 191, s. 10.

He argued that Regulation 6 subsection 1 should be interpreted so as not to exclude the Applicant under the circumstances herein. The onus is upon the Applicant to prove entitlement.

The Tribunal is of the opinion that intent of the Ontario New Home Warranties Plan Act and Regulations thereunder was (1) to grant to a home buyer certain warranties when he became an owner or (2) to protect a home buyer from loss in respect of monies coming within the meaning of "deposits" when he did not become in fact, an owner. The Tribunal is of the opinion that the submission on behalf of the Applicant makes the words "who does not become an owner and" superfluous or requires the addition of the words "under a purchase agreement with the vendor". It is clear that within the section as written the Applicant became the owner of the home in issue and is not entitled to claim under the section and accordingly under the Act. "

The Tribunal agreed with the decision of the Respondent and ordered the Corporation not to pay the claim of the Applicant.*

*Note: The above decision was appealed to the Supreme Court of Ontario (Divisional Court). The appeal had not been concluded at the time of this publication.

THE CORPORATION DESIGNATED TO ADMINISTER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT
Respondent

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN
ACTING AS CHAIRMAN
HELEN J. MORNINGSTAR and
JOHN C. HURLBURT, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent
APPLICANT - in Person

DECISION: NOVEMBER 26, 1979

The Applicant had requested a hearing for the purpose of appealing a certain conciliation decision by the HUDAC New Home Warranty Program (being the Corporation designated by Section 2 of the Act, hereinafter referred to as the Corporation), which was said to have been made on or about August 9, 1979.

It appeared that the said Corporation (pursuant to Section 17 of the Act) had effected a conciliation of a dispute between the Applicant as owner and a certain third party as vendor which had arisen from a contract for the provision of a home entered into by the Applicant and such vendor.

It further appeared that the Applicant was dissatisfied with the Corporation's decision effecting such conciliation and had been advised by the office of the Ontario Ombudsman (in a letter dated July 10, 1979) that an appeal from such a conciliation decision lay to this Tribunal. That letter reads in part as follows:

"...we will take this opportunity to advise you that, should you be dissatisfied with HUDAC's final decision, you have the right, within fifteen days of the date of that decision, to apply for a hearing before The Commercial Registration Appeal Tribunal..."

.....The Tribunal has the jurisdiction to review decisions of HUDAC Corporation. The fifteen day limit is strictly enforced. "

At the outset of the hearing the Tribunal was moved by Counsel for the Respondent for a Declaratory Order disclaiming the Tribunal's jurisdiction to hear or determine any appeal from any conciliation decision made by the Corporation pursuant to Section 17 of the Act.

In order to entertain that Motion it has been necessary for the Tribunal to determine whether it is open for it or any other Tribunal involved in a judicial function to make a determination as to whether or not a matter comes with its jurisdiction granted by a statute. The Tribunal finds that under common law as well as by the provisions of The Judicial Review Procedure Act, 1971, a party affected or about to be affected by an action of a Tribunal may apply to a superior court for a determination as to whether the Tribunal is acting within its jurisdiction. Such action may be taken at any time. But where a hearing is scheduled before a Tribunal and no prior action has been taken to determine the issue of jurisdiction, a person involved may raise that issue before the Tribunal, preferably at the outset of the hearing as in the instant case. In so finding, that it has the ability to determine, at a hearing, whether a matter comes within its jurisdiction should the question be raised, this Tribunal relies upon the decision in Re Cedarvale of North America, Local 183, 1971, 22 DLR (3rd) 40. There the Ontario Labour Relations Board had to make a determination as to whether a matter came within its jurisdiction and the court upheld the Board's right to make such a determination.

Under the New Home Warranties Plan Act, the Commercial Registration Appeal Tribunal has two functions. Under Section 9 of the Act, it is required, when requested, to hold hearings where the Registrar appointed under the Program proposed to refuse to grant or renew a registration or proposes to suspend or revoke a registration made under the Act. The other function of the Tribunal set out in Section 16 of the Act is to hold a hearing, when requested, pursuant to a decision of the Corporation made under Section 14 of the Act. A decision made under Section 14 of the Act results from a claim made against the guarantee fund. Those persons eligible to make claims against the guarantee fund are set out in Section 14 (1) of the Act.

However, the Tribunal does not have any function in the conciliation procedure set out in Section 17 of the Act. The first and fourth sub-sections of that section provides as follows:

- (1) The Corporation may, upon the request of an owner, conciliate any dispute between the owner and a vendor.
- (2) Every agreement between a vendor and prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Supreme Court, and The Arbitrations Act applies.

It would appear from these sub-sections that the conciliation function of the Corporation (exercisable at the request of an owner) is probably at the discretion of the Corporation but that it is The Arbitrations Act which is essentially prescribed by the Act as the basic and ultimate means for the settlement of differences between vendor and owner and the function and applicability of The Arbitrations Act is exhaustive commencing with the inception of the legal relationship between those parties upon the execution of the contract between them. The Arbitrations Act (subject to appeal to the Supreme Court) will apply both before and after a conciliation agreement by the Corporation under sub-section (1). This Tribunal has no function in the conciliation procedure prescribed by Section 17 which is autonomous and must be read by itself.

The Tribunal gives its decision as follows:

1. The Tribunal disclaims jurisdiction in this case.
2. The Tribunal Orders and Declares that it has not jurisdiction to hear appeals from decisions of the Corporation made pursuant to the provisions of Section 17 of this Act.

MARTIN AND ILONA SZORAD

and

Applicants

THE CORPORATION DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS, C.A., and
LOUIS RICE, MEMBERSCOUNSEL: RAYMOND L. FAZAKAS for Applicant
BRIAN M. CAMPBELL for Respondent

DECISION: APRIL 27, 1979

The Applicant required a hearing after receiving the Corporation's written decision disallowing six separate claims and offering a payment in the amount of \$1,200, which was part only of the amount claimed, in full settlement of a seventh claim. At the time the case came on for hearing the parties had essentially resolved the matters in dispute save for two items, namely, that of peeling varnish around certain windows in the warranted premises and that of a certain tiled floor therein situate.

The Respondent took the position that the peeling varnish was due to "wear and tear" and was excepted from the warranty of section 13(2) (c) of the Act but the Tribunal allowed the claim (which was for \$60) as one validly made within the one-year period mentioned in sub-section (4) of section 13.

The other claim was for the replacement of certain ceramic tiles in the kitchen. The Agreement of Purchase and Sale between the Applicants and the builder provided that the latter was to install a Corlon floor in the kitchen, but Mr. Szorad testified that when the builder commenced to plaster he and his wife made a decision to change the Corlon floor to ceramic tile and to pay for this as an extra. This and several other extras were simply added to the Statement of Adjustments (as a single item: "extras, \$800").

For some reason, probably because the subfloor was not strong or rigid enough to bear the ceramic tile substituted for the Corlon originally planned and contracted for (the evidence here was uncertain), the new tiles cracked rather badly and needed to be repaired or replaced. The Applicants obtained two estimates, one for \$4,120 (with "no guarantee against subsequent tile cracking") and one for \$3,000.

The Applicants claimed the full sum of \$3,000 but the Respondent took the following position:

- (1) That the contract was for Corlon and not ceramic tile. Since no action lay against the vendor-builder under the contract, then, under section 14 (a) or (b) of the Act, no claim existed under the Warranty Program. The Respondent was not liable to pay any compensation at all. The letter (referred to above as the Corporation's "written decision") was not a final decision at all since it was prefaced by the words "a final decision has not been made". (The Tribunal noted that this was the first time that a claim had been denied at a hearing without any notice whatsoever to the Applicants or their solicitors).
- (2) If the Respondent was liable, it was only in respect to replacement in Corlon, a Corlon floor had been contracted for, a Corlon floor (only) was warranted. The figure of \$1,200, fixed by the Respondent's own process of reckoning, would be more than enough to cover this.

The Tribunal found that the ceramic tile had not been installed as part of the original contract and was not warranted; that the Corlon floor was part of the contract, was warranted, and that the cost of supplying it now was \$1,200; and that the Respondent had failed to serve a notice of the belated oral decision together with written reasons therefor on the Applicants or their solicitors pursuant to section 16 (1) of the Act and could not now deny that its decision delivered to the Applicants had been "final".

ORDERED: The Respondent shall pay the Applicants \$1,260.

GLYN W. THOMAS and CAROL THOMAS

Applicants

and

THE CORPORATION DESIGNATED TO ADMINISTER THE ONTARIO
NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
WATSON W. EVANS, C.A. and
JOHN CORSI, MEMBERS

COUNSEL: JOHN HOPKINS for Applicants
BRIAN M. CAMPBELL for Respondent

DECISION: NOVEMBER 15, 1979

The Applicants requested a hearing before the Tribunal after receipt of the Corporation's decision dated September 5th, 1979 refusing their claim on the basis that they were the owners of the land upon which their new home was to be built at the time they contracted for it.

The Applicants, who owned a parcel of land, entered into an Agreement on the 12th day of May, 1978 with a builder whereby the builder was to construct a residence on a cost-plus basis with the Applicants paying the initial sum of \$8,000 on the signing of the contract to be deducted from the final billing.

Subsequently, on the 14th August, 1979 the Applicants paid to the builder the actual cost of materials and labour, plus 12% on certain work performed thereafter. Performance of the contract ceased with the exception of certain work performed by sub-trades to the inclusive sum of \$2,870.40.

The Tribunal's decision was given orally by the Chairman.

The Tribunal found that the Applicants properly came within the meaning of Section 14 (1) (a) which provides in part:

"A person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss...."

with the qualification:

"the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations."

The Act and Regulations have a series of definitions interrelated. It is not absolutely clear from their reading that there is the exclusion with respect to construction contracts for contracted homes. Having in mind Section 10 of The Interpretation Act and the general principle applicable where rights and benefits are bestowed, the Tribunal is of the opinion that if there is to be any exclusion, such exclusion must be clearly set forth.

It is necessary to examine the language of Section 14 (1) (a). It refers to 'person' but does not refer to 'purchaser' or 'owner'; the broadest term is used. It refers to the entering into of a 'contract'. Again, the broadest term is used: the reference is not made to 'purchase agreement'. The section refers to 'vendor'; the definition of a 'vendor' in Section 1(n) is inclusive of "a builder who constructs a home under a contract with the owner". In this instance it is not disputed that there is a "construction contract" or that the home is a "contracted home". It may be that from the use of those terms that other rights or obligations or exclusions flowed. The Tribunal does not find that by reason of this that there was an exclusion with respect to the deposit of \$8,000 paid.

Certainly a reading of the Act and Regulations without the ability to follow the intricacies of the argument by Counsel for the Corporation, would not lead one to infer that there is such an exclusion. Since it is so easy to make exclusions, the Legislature would surely have provided for such an exclusion if intended, or if the relevant regulation is within the power of the Lieutenant-Governor in Council such exclusion would have been clearly set out.

For comparison purposes references are made to the definition of a home in Section 1(d) in which there are 4 categories set out and an inclusion and an exclusion of certain types of dwelling. The Tribunal finds on its interpretation of the Act and Regulations that a person who

engages a builder to construct a home on land owned by that person is not excluded from Section 14 of the Act.

In this instance the Tribunal finds that the Applicants have, in fact, suffered a financial loss. At the time of the complete cessation of work they had paid in addition to the deposit of \$8,000, all monies owing under the contract except as related to the work of the particular week in respect of which evidence was given, and for which provision is being made. At the time of the default of the vendor there was a financial loss to the Applicants of the sum of \$5,129.60. The Tribunal is of the opinion that the expenditures subsequent to the default of the builder were made directly in respect of items necessary for the completion of the home.

Should the proper interpretation of the Act and Regulations be other than what has been stated, the Tribunal finds that the Corporation in this particular instance is estopped from denying the claim. Counsel for the Applicants uses the expression 'detrimental reliance', and the Tribunal agrees. There is a deposit receipt #91363 upon which there is a stamp "Warranty Program July 21st, 1978 Toronto". The significance of that particular date has not been clarified. It is to be noted that the performance guarantee was similarly stamped. It is significant that Exhibit 13 is an enrolment of a home dated August 8th in which there is noted an enrolment fee of \$100 ("for a contracted home"). The other date that was on the deposit receipt was a Warranty Program stamp dated August 10th. The performance guarantee under a counter-signature of an authorized representative is dated the 21st of August, 1978. These documents were remitted either indirectly through the builder, or directly to Dr. Glyn Thomas shown as a purchaser at this home. There came into the possession of the Applicant documents consisting of 2 parts.

The Corporation's claims manager explained to the Tribunal the significance of the performance guarantee. The Corporation takes the position that in the instances of this type of construction contract the performance guarantee and warranties under Section 13 are applicable. The performance guarantee is of no relevance in deciding the validity of the claim. The relevant factor is the deposit receipt, a reading of which by Dr. Thomas would indicate to him that he is entitled to payment "of all damages against the vendor for financial loss of an amount equal to all deposits". It may be that the deposit receipt was sent out in error in this particular instance. It may be that this is part of the regular routine and that the Program has not directed its attention to the significance of placing such a document in the hands of a purchaser.

The Tribunal is of the opinion that the Corporation has enabled the builder to be its agent in the handling of the documents. The documents that emanate from the builder are such that there are signatures reproduced of the senior officials of the Corporation. The Act and Regulations do not have a clear exclusion; a reading thereof would lead not only laymen, but perhaps lawyers, to believe that there is no such exclusion. This belief would be backed up where the lay person or the lawyer had a deposit receipt in his possession. Great care and caution should be had in the placing of documents in the hands of the public.

The Home Warranty Plan places pamphlets in the hands of the public in order that they understand the Program and ensure protection for themselves. The Program has in a pamphlet #6 set out: "The Warranties Plan protects your down payment on a new house up to the maximum of \$20,000. To a layman, a new house is a new house, whether it is one that is fully completed, whether it is one that has foundations and plans which can be amended, added to, or subtracted from, or whether as in this instance, it is one to be built for an owner of a parcel of land by a builder. No exclusion is referred to. It is significant that, having dealt with the 'down payment' the pamphlet proceeds into an exclusion within a different aspect, namely, "that the warranty is not available for rehabilitated dwellings, extensions, seasonal or use dwellings, mobile homes not installed on permanent foundations, or rental properties".

Lawyers are aware of the fact that it is the Act and Regulations which govern, and not pamphlets. However, in pamphlets where there is a paraphrasing of law, and when certain statutes are reproduced, caution is ordinarily made that reference should be made to the relevant Act.

The New Home Warranty Program, in all documents it places in the hands of the consumer, should caution as to exclusion. That caution should properly belong, if the interpretation of the Corporation is correct, in the performance guarantee and probably for extra precaution, in any deposit receipt issued.

If in the instance of a program such as The New Home Warranty Program which is designed by the Legislature and those who administer it "for the protection of the public" that protection is to be limited or restricted, it should be very clearly spelled out and in such a way as to bring it to the attention of those who will be affected by it.

ORDERED: That the Corporation pay to the Applicants the sum of \$5,129.60, being the sum of \$8,000.00 less the sum of \$2,870.40.

VILLAGE HOMES 370827 ONTARIO LIMITED
and Applicant

REGISTRAR UNDER THE ONTARIO NEW HOME WARRANTIES
PLAN ACT

TRIBUNAL: JACIE C. HORWITZ, Q.C., CHAIRMAN
WATSON W. EVANS, C.A. and
LOUIS A. RICE, MEMBERS

COUNSEL: BRIAN M. CAMPBELL for Respondent

DECISION: APRIL 24, 1979

The Applicant had requested a hear-

The Applicant had requested a hearing after receiving notice of a proposal dated February 27, 1979 under Section 8 of the Act from the Respondent refusing to grant it registration under the Act for the following reasons:

"Having regard to your financial position you cannot reasonably be expected to be financially responsible in the conduct of your undertakings as required by paragraph 7 (1)(a) or subparagraph 7 (1)(c)(i) of the Act..."

and recited several reasons.

As neither a representative of the Applicant nor its Counsel appeared, the Tribunal delayed the hearing for thirty minutes to permit late attendance and then proceeded to hear the matter after evidence was given of proper service of the Notice of Hearing including the Notice that in the event of non-attendance of a representative of the Applicant, the Tribunal would proceed without further notice to the Applicant.

Evidence was produced by the Respondent indicating the Applicant had not provided the proper credentials for registration, its registration fee cheque in the amount of \$350. was returned by the bank N.S.F. and had not been replaced. The Applicant indicated in correspondence the actual building and inspections were left to others and he did not demonstrate technical competence. A financial statement was not submitted.

The Tribunal unanimously agreed with the Proposal of the Registrar that the Applicant was not financially responsible and having regard to its financial position the Registrar was correct in his reasonable expectation that it could not continue responsible in its undertaking.

MR AND MRS WILLIAM WADE

and

Applicants

THE CORPORATION DESIGNATED TO ADMINISTER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

Respondent

TRIBUNAL: MATTHEW SHEARD, VICE-CHAIRMAN
ACTING AS CHAIRMAN
HELEN J. MORNINGSTAR and
JOHN C. HURLBURT, MEMBERSCOUNSEL: JANET WILSON for Applicants
BRIAN M. CAMPBELL for Respondent

DECISION: DECEMBER 20, 1979

The Applicants requested a hearing before the Tribunal.

On November 13, 1979 the Applicant and his Counsel appeared before the Tribunal to establish whether there was jurisdiction to hear the case. It was established that the Tribunal had jurisdiction and parties were directed to complete the formalities prescribed by the Statutes and its Regulations and, should the Respondent decide, under section 14, to reject the Applicant's claim, to attend before the Tribunal on November 27, 1979, at 9:30 a.m., for the hearing of an appeal to be made by the Applicants from such decision.

The Applicants again appeared before the Tribunal on November 27, 1979. Counsel for the Applicants, opening, stated that the claim was under Section 13 (1)(a)(i) and (ii) of the Act which provide that every vendor of a new home warrants to the owner that the same shall be constructed in a workmanlike manner free from defects in material and be fit for habitation. She further stated that the Applicants did not dispute that the premises had been completed in accordance with the Ontario Building Code.

The only witness called by Counsel for the Applicants was the Applicant, William Randolph Wade. Mr. Wade and his wife live in a house in Brampton, which they first occupied on December 15, 1977. Their purchase of the home appears to have been completed a few weeks later. A Warranty Certificate in respect of it was issued on January 16, 1978.

The building consists of three floors. The bedrooms are on the top floor, the dining and living rooms are located on the middle floor and the bottom level houses the front hall and a room variously described as the recreation area of basement. The Purchase Agreement provided that this last-mentioned room was to be "roughed-in" only; it was not completely finished, with no trim and little or no caulking around the windows, either on the inside or the outside. The floor is of concrete just a few inches below ground level and there is a roughed-in fireplace in this room.

This room was cold from the beginning and has continued to be cold and uncomfortable from the first winter of occupancy, that of 1977-78, through the winter of 1978-79, and remains so at the present time as we are entering the winter of 1979-80. The furnace provided is a gas-fired forced air unit located in an alcove in the lower level and the hot air it produces is conducted throughout the house by means of ducts. The ducts meant to provide heat for the lower level are located in the ceiling. The thermostat is located in the diningroom and during the winter months when this is set so as to provide a comfortable degree of warmth in that room and in the bedrooms above, the basement is cold. It was Applicants understanding that a variation of 15 degrees has existed between the temperature of the upper-level, comfortable, rooms and that of the uncomfortable room in the bottom area. No complaint is made as to the comfortable habitability of the two upper levels; it was the lower level he was concerned with. For example, snow off galoshes left by outside door here remained unmelted all night.

In cross-examination, the Applicant was asked if this basement room was "uninhabitable" and replied that it was "uncomfortable". Asked if he had done anything about this, he replied that he had made a lot of complaints and he expected to be aided by the Corporation, an organization designed to help homeowners. It was his opinion that the furnace was too small.

The Technical Representative of the Home Warranty Program was called as a witness for the Respondent. He stated his qualifications and gave details of several inspections he had made of the subject premises accompanied on at least one occasion by the contractor who had installed the heating system, and on another by the Chief Heating Inspector for Brampton. The system, on at least two of these occasions, had been "balanced" whereupon it appeared to be functioning quite satisfactorily but upon his re-attendances, on at least two occasions he stated that this "balancing" of the system had been altered

in the interim to direct more heat to the upper levels at the consequent expense of that going to the basement and this had resulted in an appreciable difference of eight degrees between the upstairs and the basement levels. The principal room in the basement he found drafty and in need of additional insulation and draft-corrective measures.

No evidence was adduced to refute this.

Mr. Wade obtained information by letter from a heating contractor.

In her summation Solicitor for the Applicant cited a number of judicial decisions including Miller vs. Cannon Hall Estates (1931) 2K.B. 113 where there was an express warranty that material and workmanship would render a house fit for habitation. The Warranty Program in Ontario, presently established by law, she argued, would produce precisely the same effect in every case warranted by it. This we grant. Another case, Smith vs. Marrable (1843) 11 M & W, p.85, was cited as authority that "fitness for habitation" means all the rooms will be used.

But the Tribunal is of the opinion that the legal arguments as to the meaning of terms such as "workmanlike" and "fitness for habitation" should not be offered in substitution for basic evidence.

In this case, an unfinished basement is what the Applicants contracted for and is what they got. One cannot expect an unfinished basement room with windows lacking trim and full caulking, a roughed-in fireplace, concrete floors and with no drapes, wall-panelling or carpet to be a suitable place for people to live in. If it isn't, and it was not proven, there has been no evidence to establish whose fault this condition results from. The Ontario Building Code sentence at 9.34.2.5 (1) indicates residential heat should be 72° F. and at sentence 9.34.2.6 (1) indicates 65° F for an unfinished basement - a spread of 7° F. being permitted.

The Applicant implied in his evidence at 15° variation between the temperature upstairs and downstairs, but no evidence to support this has been offered. The questions: was the temperature taken both upstairs and downstairs? when? by whom? with what results? - are unanswered.

The Applicants have taken the position that no engineer's report is necessary to prove (a) that there is a problem, or (b) what should be done to remedy the same. The letter from the heating contractor was more, to our thinking, in the nature of

a quotation for work which might result in a much warmer house. But this letter does not indicate, far less prove, that the house is uninhabitable or, if so, that this condition results from poor design or poor workmanship rather than the consequence of the Applicants having contracted for a house with an unfinished basement and then, subsequently, having omitted to finish it on their own.

To the contrary, the experts, inspectors and specialists testified that the heating system is perfectly in order and adequate and that the Applicants' problems stem from this forced air system not having been left in its proper state of balance or from other causes beyond the scope of the Corporation's warranty.

On the basis of the evidence which has been brought before it, the Tribunal cannot make the findings of fact which would be essential in order for this application to succeed, and is obliged to dismiss this application which, by this Decision and Order it accordingly does.

ALAN D'ORSAY REAL ESTATE LTD.
and ALAN JAMES D'ORSAY

Applicants

and

REGISTRAR OF REAL ESTATE AND BUSINESS BROKERS
Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
W.J. BINGLEY, MEMBERS

COUNSEL: ADI N. MAJAINA for Respondent
ALAN JAMES D'ORSAY Agent for Corporation

DECISION: FEBRUARY 16, 1979

The Applicants requested a hearing before the Tribunal after being informed of the Proposal to revoke the registrations of the Applicants as real estate brokers.

The Applicant admitted all of the allegations consisting of numerous violations of the provisions of the Act including inter alia large shortages of trust funds as well as not keeping proper accounts, books and records.

At the request of the parties the Tribunal gave its decision orally and without reasons as follows:

The Tribunal concurs with the Respondent's Proposal and Orders and Directs the Respondent to carry out his proposal to revoke the registrations of the Applicants as real estate brokers as of this date.

The Tribunal recommends to the Respondent that he give favourable consideration to D'Orsay's future application to become registered as a real estate salesman provided he repays all of the trust funds that he or the Applicant corporation owe to people so entitled.

In addition, the Applicant shall not make an application for a real estate broker's registration for a period of two years at which time he shall provide the Respondent with new or other evidence or where it is clear that the material circumstances have changed, in accordance with section 23 of the Act.

JOSEPH PATRICK CASSIDY

and

Applicant

REGISTRAR OF REAL ESTATE & BUSINESS BROKERS

Respondent

TRIBUNAL: J.C. HORWITZ, Q.C., CHAIRMAN
C. C. HILLMER and
JAN JUSTIN, MEMBERS

COUNSEL: EDWARD A. JUPP, Q.C. for Applicant
ADI N. MAJAINA for Respondent

DECISION: FEBRUARY 27, 1979

The Applicant requested a hearing before the Tribunal after receiving the Respondent's Notice of Proposal to refuse to renew the Applicant's registration as a real estate salesman on the grounds that, having regard to his financial position, the Applicant could not reasonably be expected to be financially responsible for the conduct of his business; and further, that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty.

The hearing was lengthy and the evidence adduced in respect to the Applicant's alleged lack of financial responsibility was, *inter alia*, that he had twice tendered cheques to the Registrar of Real Estate and Business Brokers which had been returned "N.S.F." - one of such cheques having been to cover his registration fee in the sum of \$15 and the other to cover a reinstatement fee of \$10. He was also indicated to be a judgment and execution debtor to the amount of \$12,166.69 (notwithstanding that he had, in five different applications for registration and renewal under the Act, taken his oath that he had no unpaid judgments against him). Some uncorroborated evidence indicated that he owned a beneficial interest in certain foreign real estate but his own testimony was that he had no assets in Canada. There had been other N.S.F. cheques in amounts slightly more or less than \$100 tendered in payment of the Applicant's rent, automobile fuel and long-distance charges.

The evidence brought forth in support of the second reason for the Respondent's Proposal was fairly voluminous. The Applicant admitted that on at least one occasion he had placed either the name or initials of a person or persons other than himself to a document in the course of real estate dealings. The evidence indicated that offers to purchase a mortgage application and letters were involved. He testified that he did not know it was necessary to have a power of attorney in order to sign someone else's name.

The Tribunal found on the evidence that the Applicant had profited by forgeries and utterings as he collected commission as a result of same; that he failed to disclose his interest in certain offers to purchase properties, contrary to section 42 of the Act. In addition he contravened sections 3(1)(b), 31(1), 37, 38, 41, 43 (1) and (3), 46 (1) and (2) (c) and 47 of the Act. He did not fulfill his fiduciary duties as agent for various vendors whom he represented as he did not make full disclosure of all material facts and circumstances within his knowledge which might affect the vendors' decision to sell. He took false oaths and contravened The Business Practices Act, 1974, section 2 (a) (ii) in that he made representations that he had certain sponsorship, approval, status, affiliation or connections that he did not have, as well as section 2 (a)(xii) in that he made representations that misrepresented his authority as employee or agent to negotiate the final terms of the transactions referred to in evidence.

The Tribunal was of the opinion because of its findings that the Applicant was not entitled to be registered as a real estate salesman under the Act for the following reasons:

1. Having regard to his financial position, the Applicant cannot reasonably be expected to be financially responsible for the conduct of his business; and
2. The past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

The Tribunal therefore concurred with the Respondent's Proposal.

ORDERED: That the Respondent be directed to carry out his proposal to refuse to renew the registration of the Applicant as a salesman of the registered real estate broker, Cimerman Real Estate Limited, or of any other broker as of this date.

MERWAN B. IRANI

and

Applicant

THE BOARD OF TRUSTEES UNDER THE TRAVEL
INDUSTRY ACT, 1974

Respondent

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
MATTHEW SHEARD and
GORDON ALEXANDER, MEMBERSCOUNSEL: APPLICANT in person
MICHAEL D. LIPTON for Respondent

DECISION: DECEMBER 12, 1979

The Applicant, Merwan B. Irani, made a claim upon the compensation fund under Section 15 of the Schedule to Ontario Regulation 367/75 made under The Travel Industry Act, 1974 for the refund of the sum of \$5,000 made as payment to Capitol Travel, a participant, for travel services contracted for but not received.

The decision of the Tribunal was given orally by the Chairman.

The Applicant has made a demand for payment from the participant and the participant refused. The Board of Trustees has refused the claim upon the fund.

On behalf of the Board of Trustees it was submitted by Counsel that the refusal was based on the following reasons:

1. The moneys were not paid for travel service.
2. The participant refused to pay with legal justification.

On behalf of Irani, it was argued that Irani paid Capitol \$5,000 in advance for travel purposes and was given a proper receipt and a legal and valid miscellaneous charge order (M.C.O.)

The circumstances of the payment as testified to by the Applicant are as follows.

In the fall of 1978 the Applicant and his wife were contemplating the coming to Canada of the Applicant's mother-in-law and had decided during the course of the immigration proceedings that

the family would take a vacation to India to return with the mother-in-law. This came to the attention of his brother-in-law who managed the Toronto office of Capitol Travel, Zahir Modi, who assured Irani that he would match any deal on fares offered by any other agency. In March, 1979 because Capitol Travel was having financial problems in that a cheque payable was not honoured. Because a cheque received was not honoured, Modi requested Irani to pay in advance so that Capitol Travel could retain the stock of airline tickets.

Irani borrowed the amount from the bank (in the place of cashing deposit certificates) and issued a cheque dated 21 March, 1979 for \$5,000 to Capital Travel giving the same to Modi at his (Irani's) home. On the 27th March, 1979 Modi delivered to him at his home a Participant's Receipt Form 0129 for \$5,000 showing "Received from Mr. M. Irani c/o Mr. Modi the sum of Five Thousand Dollars for travel arrangements". The receipt was signed by Javed, another Capitol Travel employee. The validity of this receipt was not called into question. Being advised that a visa had been issued (as of 4 April, 1979) he approached Modi for the tickets though he was not sure of the date of departure nor as to the final routing. Mr. Modi was at that time aware that Capitol was again experiencing financial difficulties. He issued to Irani a British Airways M.C.O. The order was made out in respect of Mr. and Mrs. Irani plus 3 children, and Mrs. Khalik in the amount of \$4,590 for transportation coded Toronto-London-Calcutta-London-Toronto excursion.

Irani learned that his mother-in-law's visa was to expire 14 June, 1979 and to avoid medical re-examination it was decided that she would come on her own. Irani advised Capitol Travel that he wanted to cancel his trip and sought a refund. Capitol through its proprietor, Shakil A. Khan, refused. Irani claimed from the fund.

During the course of the claim procedure, Irani returned the M.C.O. to British Airways who then refunded to Capitol the \$4,590 which had been paid to British Airways in respect of the M.C.O.

The position of Khan was that the \$5,000 was a loan made to Modi personally in order to assist him in respect of some responsibilities of his with respect to his management of Capitol Travel funds.

The testimony of Modi in this regard was as follows.

In March of 1979 because of the financial problems of Capitol, Khan suggested to him that he arrange for funds. Modi thereupon borrowed (he maintained for Capitol) the sum of \$5,000 from one, Ezra Asher, and the sum of \$5,000 from his wife (Mrs. Modi), and asked Irani to pay in advance for his transportation.

With respect to Asher, he issued him a post-dated cheque on a Capitol Travel form for \$5,100, the \$100 being for interest, and did not deliver to him a receipt form #0128 made out which had written a notation 'loan' under the printed words, travel arrangements.

After mid April, Modi realized that Capitol Travel began to have financial problems. He did the following:

He took current receipts and obtained a bank draft for \$5,100 and gave the same to Asher; he issued a counter cheque to Mrs. Modi for \$5,000 and when requested by Irani for tickets, he issued a M.C.O. to Irani for the amount necessary for air travel to India as planned. He did not issue open tickets as he maintained that the necessary kind were not in stock. He thereupon left the employ of Capitol Travel.

It was maintained by Khan that the March, 1979 financial problem was by reason of some 'shortage of funds' caused by Modi and that Modi needed the funds personally to 'compensate'. Upon hearing of the issuance of the M.C.O. Khan sent a cable to Irani that the M.C.O. had been "voided and reported stolen to police and all airlines".

In support of his contention that the Irani payment was a loan personally to Modi, Khan made reference to the Asher and Mrs. Modi transactions. He maintained further that Modi "fraudulently issued the M.C.O. ... thus making it easy for Irani to obtain funds from British Airways and relieving him of the liability of the personal loan".

He was of the opinion that it made "no sense that Irani borrowed the money and paid it to a travel agency for some future travel plans" and could not understand why Mr. Irani accepted a \$4,590 M.C.O. against \$5,000 he paid, after one month. Modi was to testify that the \$4,590 was the exact fare for the trip to India.

It was testified to that it was most unusual that an M.C.O. be issued to originate from the city of issuance, and that this particular M.C.O. was not complete in that the ages of the children were not shown. The Tribunal accepts this. However, it was not disputed that the M.C.O. was nonetheless a valid negotiable

instrument for value of transportation in the amount stated. Modi testified that the M.C.O. was only good for exchange on the airline tickets. With respect to Irani's borrowing from the bank instead of cashing deposit certificates, the Tribunal is of the opinion that it is not an inconceivable action, if, for example, the interest to be paid is less than the interest accrued which would be forfeited upon premature cashing. Khan was aware of the monies being received by Modi and the same being deposited to Capitol Travel. Modi was in complete charge of the Toronto Office and had full authority and responsibility. Modi was the authorized agent of Capitol Travel as far as the public was concerned, to perform all acts on behalf of and in the course of Capitol Travel. There is no evidence that the M.C.O. was stolen and known to be such to Irani, in which instance, the issuance to Irani would have been void ab initio.

Khan's claim is against Modi if Modi improperly issued the M.C.O.

The Tribunal finds that the \$5,000 paid by Irani was payment in advance for travel service. There is a receipt in acknowledgement of actions in respect of the arrival of the mother-in-law by Irani. The fact that at the same time that the advance was made other arrangements by way of loans were made do not confirm the Irani transaction as also being a loan transaction. Capitol Travel received the funds, and an authorized employee issued an M.C.O. in respect thereof which was surrendered and no travel service rendered.

Having found that the travel services were not rendered, the Tribunal further finds that there is no legal justification for refusal for the payment by Capitol Travel.

The Commercial Registration Appeal Tribunal hereby allows part of the claim and directs the Trustees to pay the sum of \$4,975 to the claimant, being the sum of \$5,000 less cancellation fee \$25.

ONTARIO MOTOR LEAGUE WORLD WIDE TRAVEL (LONDON) LTD.

and **Applicant**

BOARD OF TRUSTEES OF THE COMPENSATION FUND UNDER THE
TRAVEL INDUSTRY ACT, 1974

TRIBUNAL: JOHN YAREMKO, Q.C., CHAIRMAN
HELEN J. MORNINGSTAR and
GORDON ALEXANDER, MEMBERS

COUNSEL: MICHAEL D. LIPTON for Respondent
BRIAN W. BARNARD - Agent for Applicant

DECISION: AUGUST 15, 1979

The Applicant had requested a hearing before the Tribunal after receipt of the Notice of Decision by the Board of Trustees under the Compensation Fund, dated May 23, 1979 advising it:

"With reference to your claim in the amount of \$1,078.20..... your claim is not eligible for payment."

It was not disputed that all relevant times Elkin Tours Limited was registered as a Travel Wholesaler, that the Applicant, Ontario Motor League World Wide Travel (London) Ltd. was registered as a Travel Agent, that both were participants in the Compensation Fund, and that the Applicant is entitled to participate in the Fund.

The facts of the case are as follows:

In payment on account of a one-week package tour with Elkin in the sum of \$1,198.00, on or about the 31st October, 1977, the Applicant, through the travel agency manager, by letter addressed to Elkin, 27777 Franklin Road, Southfield, Michigan forwarded \$200. by way of a deposit for a flight departure on December 26th to Antigua. the cheque was to the order of Elkin Tours Inc. at the above address. On or about the 28th November, 1977 the Applicant forwarded \$878.20, being the balance of the amount owing less commission. The cheque was issued to the order of Elkin Tours Ltd. at Ste. 1706, 2200 Yonge Street, Toronto.

The payment was from the funds of the Applicant; it was not client's money.

On or about the 23rd December, 1977 the Applicant advised Elkin (Toronto) that the booking was being cancelled for medical reasons. Elkin (Toronto) acknowledged the cancellation and requested a medical certificate and the memo in respect thereof had the notation "Money refunded less cancellation charges only upon receipt of your cancellation letter."

On or about the 9th January, 1978, the requested medical certificate was furnished to Elkin (Toronto) and a refund was requested.

On or about the 15th February, 1978, the clients were re-booked with Elkin for Barbados, and on or about 23rd February, 1978 the Applicant forwarded to Elkin (Toronto) the sum of \$1,015.52 in payment of the booking. The payment was 'client's money', having been received on 22nd February, 1978 from the client. The booking was fulfilled and the services rendered.

In April, 1978 the travel agency manager left the employment of the Applicant and the accounting department noted that the refund had not been received and the tickets had not been returned.

On or about the 21st June, 1978, the Applicant forwarded the tickets to Elkin (Southfield) making reference to the cancellation of December 23, and the mailing of the doctor's certificate on January 9, 1978 and again reminded them the refund had not been made.

In July the Applicant's auditor wrote to Elkin to obtain a verification from Elkin in respect of the fiscal year ending May 31, 1978, that the money was owing but the request was returned unopened. The Applicant became aware through a trade journal that Elkin was no longer in business.

On September 13, 1978 the Applicant advised the Registrar that they were unable to collect outstanding cancellation monies and asked the Registrar to look into the matter.

On September 20th the letter was acknowledged by the Compliance Officer who referred Applicant to the Solicitor for Elkin Tours and further refused the claim.

On September 26th, 1978, the Applicant wrote to the Solicitor outlining the matter to date and received no reply. In February 1979 the counsellor left the employ of the Applicant

and a new General Manager took over the file. On March 6, 1979 he wrote to the Compliance Officer indicating they were unable to obtain satisfaction from Elkin Tours and requesting a claim against the Compensation Fund be processed.

Claim forms were received and a formal claim was filed on or about May 2, 1979.

Paragraph 2 thereof stated:

"2. The Client has made payments totalling \$1,198.00 to the travel agent for the provision of travel services."

There subsequently followed the Notice of Decision of May 23, 1979.

When the testimony on behalf of the Applicant showed that the client had paid no money in respect of the December 26, 1977 booking but that it was the Applicant's money that had been paid to Elkin, the Solicitor for the Board moved to have the claim dismissed on the clear fact that the claim did not come within the Regulation, Section 15 (2) of the Schedule:

"(2) Where a participant who is a travel agent has acted in good faith and at arms' length with a participant who is a travel wholesaler and where the participant who is a travel agent has passed his client's money to the participant who is a travel wholesaler and has at his own expense reimbursed his client or arranged alternate travel for travel services contracted for and not provided to the client, effective on and after the 15th day of July, 1975, the participant who is a travel agent shall be entitled to claim for the refund of that portion of the client's moneys passed to the participant who is a travel wholesaler and shall not be entitled to claim any commission received or owing on account of the services contracted for."

The evidence before the Tribunal is that with one exception, the claim met the requirements of section 15, subsection (2). The exception is that the Applicant did not 'pass his client's money' and the Tribunal so finds. Accordingly, the Tribunal is of the opinion that that factor, that exception alone, is a bar to the claim.

The Tribunal for the reason stated herein refused to allow the claim.

AUG 13 1986

3 1761 11469027 4

